1989

State of Utah v. Reid H. Ellis : Brief of Appellant

Utah Court of Appeals

George W. Preston; Attorney for Respondent.
Glen J. Ellis; Attorney for Appellant.

IN THE UTAH COURT OF APPEALS, STATE OF UTAH

STATE OF UTAH	) CASE NO. 890366-CA
Plaintiff and Respondent	) Priority - 3
VS.	)
REID H. ELLIS,	)
Defendant and Appellant	)

BRIEF OF APPELLANT-DEFENDANT

APPEAL FROM A DENIAL OF A MOTION TO SUPPRESS,
APPEAL FROM DENIAL OF A MOTION FOR CHANGE OF VENUE,
AND APPEAL FROM A JURY VERDICT ON THREE COUNTS

FROM THE FIRST CIRCUIT COURT, RICH COUNTY
THE HONORABLE ROBERT W. DAINES, JUDGE

GLEN J. ELLIS
Attorney for Appellant
60 East 100 South, # 102
P.O. Box 1097,
Provo, Utah 84603

GEORGE W. PRESTON
Attorney for Respondent
Rich County Attorney
31 Federal Avenue,
Ogden, Utah 84321

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BRIEF OF DEFENDANT-APPELLANT

JURISDICTION;

The basis for this appeal, is found in 78-4-11, UCA, and under Rules 3 and 4, Rules of the Utah Court of Appeals. The Defendant was convicted by a jury of three separate offenses; Assault on a Peace Officer, Possession of Alcohol, and Retail Theft. He had made timely Motions for Change of Venue , to Dismiss and for Suppression of Evidence, all of which were denied. He appeals from all of these actions of the Circuit Court

STATEMENT OF ISSUES:

The following issues are presented for Review:

1. Whether the court erred in refusing to grant Defendant's Motion for Change of Venue.

2.Whether the court erred in allowing the prosecution to change a charge of "Interfering with a Peace Officer", a class "B" misdemeanor to a charge of "Assault on a Police Officer, a class "A" misdemeanor.

3. Whether the officer arrested the Defendant

illegally, ie. without a warrant, for a misdemeanor occuring outside his presence.

4. Whether the Court erred in not suppressing evidence obtained after an illegal arrest, without warrant.

5. Whether the Court erred in not overturning a conviction based on evidence so lacking and unsubstantial that reasonable men could not reach a verdict of guilty beyond a reasonable doubt.

CONSTITUTIONAL PROVISIONS, STATUTES, RULES & CASES:

The Defendant considers the following to be determinative of the issues herein:

1. Article I, Section 14, Utah Constitution;

> " The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and siezures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be siezed."

4th Amendment, U.S. Constitution .
Identical wording to that quoted above in Art.I, Sec 14, Utah Constitution.

2. Utah vs. Bradshaw 541 P2d 800, photocopy set for in Addendum #1.

State vs. Mendoza 748 P2d 181 , photocopy set forth in Addendum #2.

State vs. Hygh, 711 P2d 264, photocopy set forth in Addendum #3.

State vs. Gallegos, 712 P2d 207 , photocopy set forth in Addendum #4.

State of Washington vs. Dresker 693 P2d 846, photocopy set forth in Addendum #5.

State of Oregon vs. Roberts 706 P2d 564, photocopy set forth in Addendum #6.

STATEMENT OF THE CASE:

Defendant was arrested in Laketown, Rich County, in connection with a report phoned in by the proprietor of the Old Rock Store, in Laketown, to the County Sheriff, in Randolph, some 20 miles away, that she may have had a 12 pack of beer stolen by a group of teenagers. (Transcript of Motion to Suppress, P.5; Trial Transcript, P138)

The Sheriff, who was not present when the alleged theft occurred, did not have a Warrant. (Trial Transcript pp. 51 thru 54). His informant told him that there were four boys involved, but when the beer was allegedly taken, one boy (the defendant) was not in the store, but was waiting in the car. (Transcript of Motion to Suppress, Testimony of Renee Early, pp 8-9) Neither the store proprietor or the Sheriff was sure, at the time of their phone call as to which three boys were involved, and which one was not.

The Sheriff went to the Bear Lake Cabin belonging to Defendant's mother's family, the Hardings, where he placed Defendant under arrest, and took physical custody of him, based solely on the phone complaint from Mrs. Early. (Transcript of Motion to Suppress, p. 53, 54 & 55) The Sheriff marched Defendant around the cabin to where the other boys were, the Sheriff saw a can of beer, unopened on the floor beside a bed. He put a handcuff on Defendant.

The boys demanded to see his Warrant of Arrest, and/ or a Search Warrant, (the Sheriff was not wearing a uniform or a badge) and demanded that he leave the cabin if he did not have one, (Trans. of Motion to Suppress, p.59) he replied that he did not need one, and proceeded to forceably attempt to cuff the Defendant's other wrist, which action Defendant resisted.(Transcript of Motion to Suppress, pp 260,) The action of the Defendant, knowing he had committed no offense is justified, (See Utah vs. Bradshaw 541 P2d 800, Addendum #1.)

The other boys, who until then were sitting on their beds, protested the use of such violence by the officer; the Sheriff then pulled a loaded pistol from his belt holster, brandished it in the faces of the boys, and dragged the defendant, by the one fastened cuff, across the cabin. The defendant braced his feet on the doorframe and refused to go with the sheriff, who then went back to his car and radioed for assistance. His call was responded to by two State Park officers, a Fish and Game officer, and a Utah Highway patrolman.

Two 15 year old boys went up to the sheriff to try to reason with him, and get the sheriff to talk to their father on the telephone. The sheriff handcuffed them to the fence. The five armed officers, with loaded pistols and shotguns, and a police attack dog then proceeded to raid the cabin, forceably and violently throw down and handcuff the Defendant and another 18 year old boy who were pleading all the while for the officers to talk to their father, and attorney, on the phone.

<u>After</u> taking the boys to Jail, in Randolph, the sheriff obtained a Search Warrant from the local Justice of the Peace, Raymond A. Cox. The Sheriff and other officers searched both the cabin, and the defendant's car, and found no evidence of the 12 pack of Milwaukee Best Beer allegedly stolen from Mrs. Early.

The defendant and other 18 year old boy were issued misdemeanor citations, charging him with theft, under 76-6-602 UCA, Illegal Possession of Alcohol under 32A-12-13 UCA (both Class "B" misdemeanors) and Interferance with a Police Officer, under 76-8-305 UCA, a Class "B" misdemeanor. They were arraigned the same day, November 14, 1988, before the Justice of the Peace, who after receiving pleas of "Not Guilty" on all charges, released defendant on his own recognizance. The sheriff however refused to release the boys, claiming he was going to file additional charges, so that Defendant's father had to put up bail, and receive the permission of Judge Perry, the Circuit Court judge to take the boys, before the sheriff would release defendant. Six weeks later, the County Attorney after having the charges transferred to the Circuit Court, filed an Information, charging the Defendant with :

Retail Theft, under 76-6-602 UCA (Cl. "B")

Unlawful Possession 32A-12-13 UCA (Cl. "B")

and Assaulting a Police Officer, 76-5-102.4 UCA, (a Class "A" misdemeanor, and a totally different and more serious offense.

SUMMARY OF ARGUMENTS:

POINT I:

THE COURT ERRED IN REFUSING TO GRANT A CHANGE OF VENUE.

POINT II:

THE COURT ERRED IN ALLOWING AMENDMENT OF THE CHARGES TO DIFFERENT AND MORE SERIOUS CHARGES.

POINT III:

DEFENDANT WAS ILLEGALLY ARRESTED WITHOUT A WARRANT

FOR A MISDEMEANOR ALLEGEDLY COMMITTED OUT OF THE OFFICER'S PRESENCE.

POINT IV:

THE COURT ERRED IN NOT SUPPRESSING ILLEGALLY OBTAINED EVIDENCE, OBTAINED WITHOUT A WARRANT.

POINT V:

THE COURT ERRED IN NOT OVERTURNING A CONVICTION WHEN THE EVIDENCE WAS SO LACKING AND UNSUBSTANTIAL THAT REASONABLE MEN COULD NOT REACH A VERDICT OF GUILTY BEYOND A REASONABLE DOUBT.

ARGUMENT:

POINT I:

THE COURT ERRED IN REFUSING TO GRANT A CHANGE OF VENUE.

Defendant made a timely Motion for Change of Venue, based on the fact that in the tiny county of Rich, that he, as a "Summer people", could not receive a fair trial. His motion was supported by the required affidavits, one from Defendant and another from Wayne Parry, who testified as to the prejudice against outsiders in Rich County, where he resided from age 15 thru 18, and where he was constantly hassled by Sheriff Cockayne and his department.

The County seat in Rich County is in Randolph, population around 500. The sheriff is a resident of Randolph. (Trial transcript, p. 105). Five of the six jurors are residents of Randolph, the sixth is from Woodruff, three miles away, population 200.
the total population of Rich County is only 1615.

Seven of the 17 member jury panel had heard of the case, (Trial Transcript, pp. 8 thru 23) through neighborhood gossip or were acquainted with the officers personally, so that defense counsel had to either waive one of his statutory challenges or come back on a subsequent date. Several of those jurors selected had heard gossip about the case.

The signal case on Change of Venue is of course State vs. James, 99 Ut Adv. Rep. 14, decided January 6, 1989, copy of which is attached as Addendum #7. The factors necessary to see that a fair trial is accorded are, as the court found in State vs. James; Standing of Accused and Victim in the community, Size of Community, Nature and Gravity of Offense, Nature and Extent of Publicity.
In this case, in a county where there is no newspaper, where the jurors living in the same or next small town denied knowing the Sheriff, a lifelong resident, with 8 years in police work, and where defendant is accused of Assault on the same officer, it defies logic that those jurors could give a fair decision. The Jury Verdict, flying in the face of the store owners admission that this Defendant was not present in her store when the alleged shoplifting occurred only evidences the underlying truth: the defendant could not expect a fair trial in Rich County.

POINT II.

THE COURT ERRED IN ALLOWING AMENDMENT OF THE CHARGES TO DIFFERENT AND MORE SERIOUS CHARGES.

Rule 4, Utah Rules of Criminal Procedure, (77-35-4 (d) UCA), allows amendment of an Information, subject to certain limitations:

> "The Court may permit an indictment or Information to be amended at any time before verdict if no additional or different offense is charged and the substantial rights of the defendant are not prejudiced."

In this case, Defendant was originally given a Citation to the JP Court, where he was arraigned November 14, 1988, the day of the incident and entered "Not Guilty" pleas to : 1. Theft under 76-6-412 UCA, a Class "B" misdemeanor; 2. Illegal Possession of Alcohol under 32A-12-13 UCA, a Class "B" misdemeanor and 3. Interferance with a Police Officer under 76-8-305 UCA, a Class "B" misdemeanor. Defendant was released on his own recognizance.

The Sheriff illegally refused to release the Defendant; stating that he intended to file even more charges. The undersigned then contacted Judge Perry of the First Circuit Court in Logan, who verbally ordered the release of the Defendant upon the posting of one thousand dollars in bail.

On November 1, 1989, the County Attorney filed a Motion to Transfer, which Judge Cox, the JP, signed November 4, 1988. On November 22, 1988, the County Attorney filed an Information charging Defendant with:

1. Retail Theft, under 76-6-602 UCA, a Class "B" misdemeanor;

2. Unlawful Possession of Alcohol under 32A-12-13 UCA, a Class "B" misdemeanor (the only charge not changed)

3. Assault on a Police Officer under 76-5-102.4 UCA, a Class "A" misdemeanor. The last charge is not only different as to the elements of the offense, and one calculated to prejudice the jury, because it alleges a physical attack on the Sheriff, but it imposes a much more potent penalty.

Two of the three changes noted are obviously in violation of Rule 4 Utah Rules of Criminal Procedure, quoted infra. Both changes are "different charges", and obviously, changing from the Interfering charge to the Assault charge would prejudice the substantial rights of the defendant.

POINT III.

DEFENDANT WAS ILLEGALLY ARRESTED WITHOUT A WARRANT FOR A MISDEMEANOR ALLEGEDLY COMMITTED OUT OF THE OFFICER'S PRESENCE.

The Defendant was arrested by the Sheriff at the Harding Haven cabin some two hours following an alleged shoplifting incident at the Old Rock Store. The officer did not have a warrant for the arrest of defendant, and in fact the defendant was not even in the store when the alleged incident occurred. (Suppression Hearing Transcript P 8-9)

77-7-1 UCA defines "arrest", as an "Actual Restraint", and allows no more use of force than is necessary to effectuate the restraint.

77-7-2 UCA allows a peace officer to arrest without a Warrant, only if the offense is committed in his presence, or if it is felony which the officer has reasonable cause to believe was committed by defendant.

In this case, the sheriff knew that at least one of the boys had not even been in the store when the alleged shoplifting occurred. He arrested defendant solely on the report of the shopkeeper. (Trans. of Motion to Suppress, pp.51,52,53,54). The sheriff admitted that at the time he told the defendant "come with me", the defendant was in custody.(P 53.).

The sheriff attempts to buttress his position with the assertion that he could smell alcohol on the breath of

the defendant, but it is noteable that he refused to give a requested breath test to really find out who was telling the truth. (Trial Trans. p.182) What the sheriff wants to do is quickly skip over the illegal arrest, and try to find some other basis for an arrest, ie. an alleged smell of alcohol, and an unopened can of beer, but those pieces of evidence, are tainted by the fact that there was no warrant for arrest, and evidence illegally obtained is not admissible to justify a false arrest. Chimel V. California 395 U.S. 752; 89 S.Ct. 2034; 23 L.Ed. 2d 685. The first prerequisite is that the officer is lawfully present, and that he is within parameters of the Arrest statute. 77-7-2 UCA. Sheriff Cockayne was not, his arrest of the defendant is defective, and subsequent patching on of illegally obtained evidence should be prevented by this court as a protection guaranteed by the Fourth Amendment of the Constitution and Article 1 section 14 of the Utah Constitution.

POINT IV.

THE COURT ERRED IN NOT SUPPRESSING ILLEGALLY OBTAINED EVIDENCE, OBTAINED WITHOUT A SEARCH WARRANT.

Closely related to the question of lawfullness of a Warrantless Arrest, is the question of Illegal Search and Siezure.

Defendant made a timely motion under Rule 12, Utah Rules of Criminal Procedure, to suppress all evidence obtained pursuant to both an unlawful arrest, with out warrant, and an unlawful Search and Siezure, effected without a Search Warrant. The ruling of Judge Perry is found on P. 66 of the Transcript of the Motion to Suppress.

The Court confuses the law. Said Judge Perry:

> Testimony of the--Mrs.Early establishes reasonable cause for believing that the persons had committed a public offense, even though not in the officer's presence. Section 77-13-3 (sic, apparently meant 77-7-2) provides that where an officer has reasonable cause and he thinks that it's possible that the persons may destroy or conceal evidence of the commission of the offense or flee the jurisdiction, he can make the arrest before a warrant may be obtained."

That statement of the court is in itself, reverseable error. The court confuses probable cause as a basis for ignoring the requirement for a Warrant. The officer, in order to make a lawful arrest, must have both probable cause, and a warrant, or to have been present when the alledged offense occurred. (State vs. Mendoza , 748 P.2d 181). Probable cause is not a substitute for either the warrant, or the officer's presence at the scene. The Fourth Amendment to the U.S. Constitution requires

> ..."no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be siezed."

The Judge tries to justify his manifest error, by throwing in the gratuitous proposition that if the officer has reasonable cause to think that the defendant may either destroy the evidence, or conceal it, or flee the jurisdiction, that the officer can make the arrest without warrant. It is noteable that the prosecution did not say one word about such exception to the Warrant requirement, nor did any witness. The sheriff did in fact obtain a warrant, very quickly from Justice of the Peace Cox, it was signed by the Justice at 3:44 PM, after the boys had all been arrested, and transported to Jail. (Trans. of Motion to Suppress, pp 60, 61).

The sheriff had claimed to the boys that he did not need a search or arrest warrant, (Transcript of Motion

to Suppress, p 43; Trial Transcript p. 260.

The Utah Supreme Court delineated the need for a specific Search Warrant, in State vs. Gallegos, 712 P2d 207, and declared that the decision as to what may be siezed, and what may not, is a judicial decision, as opposed to administrative (eg. by the sheriff), See P 209, headnote 2-3, and footnote 8.

The purpose for the Constitutional prohibition against unlawful searches and siezures, is to protect the privacy and personal rights of citizens from intrusion by law enforcement officers. The case in point is a good illustration, an innocent defendant, not even present when the alleged crime being investigated, is arrested, just because the Officer makes a self serving decision that he has reasonable cause, and does not therefore need a Warrant from a judge. Because the lower court did not properly protect that innocent young defendant's rights, a jury finds the defendant guilty, not only of the crime which he obviously did not commit, but two others flowing from it. The jury even finds defendant guilty of Assaulting a Police officer, when the obvious fact is that the officer illegally assaulted the defendant.

A search, without warrant, or Search Warrant, is illegal; even incriminating evidence, like an unopened can of beer, is tainted, when as here, the officer is not lawfully on the premises. The officer's selfserving claims that he entered with permission, totally refuted by the four boys, will not redeem the original unlawful entry, nor make valid, the illegally siezed evidence. (Gallegos, infra, p. 211.)

The sheriff, after entering the cabin, found an unopened can of beer. He noted that the boys disavowed any knowledge of the beer.(Trans. of Motion to Suppress, p.57).

The explanation for the beer being found in the cabin was supplied by Sandra Harding, see Trial Transcript, pp 322-323, which left the sheriff with no evidence of shoplifting, of any kind, which would justify the arrest of Defendant. Even the pretextual search of the cabin, after the sheriff did obtain a Search Warrant, failed to produce any of the supposedly stolen 12 pack of Milwaukee's Best Beer, or the package, or any cans, empty or full. (See copy of the Search Warrant, and affidavit of Sheriff Cockayne, obviously based on heresay, which turns out to be false, Addendum #8.)

There was no basis for the court finding that there were "Exigent circumstances", justifying warrantless entry into the cabin, (see Oregon vs. Roberts, 706 P2d 564;) since no evidence was even introduced on the subject, it was improper for the judge to throw away defendants constitutional rights in such a fashion.

See also, State V. Hygh 711 P2d 265, discussing the fruitlessness of an after the fact search made with a Search Warrant, "a mere pretext" (p. 267,268.) to try to cover up the original unlawful search and seizure.

POINT V:

THE COURT ERRED IN NOT OVERTURNING A CONVICTION WHEN THE EVIDENCE WAS SO LACKING AND UNSUBSTANTIAL THAT REASONABLE MEN COULD NOT REACH A VERDICT OF GUILTY BEYOND A REASONABLE DOUBT.

There has already been ample discussion of the fact that the prime witness, Renee Early, proprietor of the Old Rock Store, exculpated this defendant, saying that he was not even present when the alleged shoplifting occurred.

Defendant filed a timely Motion to Dismiss Count II, Retail Theft, after Mrs. Early's testimony, which the

court turned down, on the theory that the Prosecution might produce some evidence that the Defendant might be implicated. None was ever produced, the Defendant's motion should have been granted. The sheriff himself admitted having no evidence of Aiding and Abetting, (Trial Transcript p.140.)

Likewise, with respect to Count I Assault Against Police Officer on duty, there was evidence that until the officer slapped a handcuff on the Defendant, he had been totally cooperative (Trial Transcript, p. 143). The officer had complete control of the situation, he could, if he had completed his investigation before becoming physical, have determined that the unopened can of beer had been left by Mrs. Sandra Harding, and that it was not part of the 12 pack allegedly stolen from the Old Rock Store.

Instead, the officer elected to use force and violence far beyond what was called for. He cuffed the defendant, threw him down on a bed and tried to forcefully handcuff defendant. That does not add up to evidence of an Assault on a Police Officer; it might be Interferance, if the Officer was effecting a lawful arrest, but he was trying to arrest the wrong person. (See the rules as to quantum of evidence required to exclude every reasonable doubt other than the defendants guilt, State vs. Lamm, 606 P2d 229; State vs. John, 586 P2d 410, 411.

It is interesting that in the separate actions against the other boys, that all charges were dropped against Shane Miller, age 15; the other 15 year old, Lee Ellis was acquitted of the charges of Shoplifing and Assault, and was found guilty only of Interfering. The other 18 year old, Mark LeFevre was charged with five offenses. He had a prior record, so was coerced thru the multiplicity of charges, into plea bargaining to avoid going

to prison. He plead guilty to the shoplifting charge, (notwithstanding the total lack of physical evidence of any such offense), and Interfering. Only this defendant, the one who was palpably innocent of the original shoplifting charge, has been found guilty of all three offenses.

The ruling of the Circuit Court, upholding an obviously biased decision of the Jury is a miscarriage of Justice, which it is incumbent on this court to correct.

SUMMARY:

1. The defendant should, in order to have received a fair trial, have had his Motion for Change of Venue granted. Six jurors, all living in the same or adjoining town where everybody knows everybody, with the sheriff, who obviously knew, and were either fearful of or loyal to the Sheriff, found defendant guilty on such thin and unsubstantial evidence, that no reasonable man could find, on that evidence, that Defendant was guilty beyond a reasonable doubt.

2. The County, obviously sure of it's ability to convict defendant, proceeded to "throw the book" at defendant; charging him initially with three Class "B" misdemeanors, and then amending by the Information, to charge two Class "B" offenses, and one Class "A". This crass violation of Rule 4, Utah Rules of Criminal Procedure exposed Defendant to additional and more serious punishment, an obvious violation of the Rule.

3. The Sheriff's arrest of Defendant for shoplifting was a classic violation of the Arrest statutes. The offense, a misdemeanor, occurred outside the officers presence; the arrest was without warrant. Picking the one obviously innocent boy of the four illustrates why Warrants

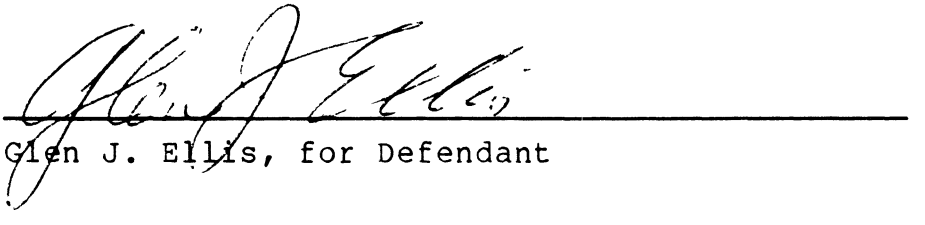
of Arrest are required, to avoid punishment of the guiltless, based on the officer's inadequate knowledge of the facts.

4. A warrantless search and siezure turned up only one unopened can of beer, which subsequent facts proved without doubt, belonged to a previous user of the cabin, not to defendant. The officer's unwarranted invasion of the privacy of defendant and others should have resulted in suppression of the evidence, which would have obviated an unjust verdict.

5. The presumption of innocence, requires that a defendant be convicted of a crime only when the evidence is sufficient to prove beyond a reasonable doubt that the crime has occurred. This case is the result of bias on the part of a jury, influenced by a sheriff with a reputation for hasseling teens. The evidence should have resulted in a verdict of not guilty, failing which the Court should have granted relief.

This multiplicity of errors by the court, in all justice needs to be reversed by the Court of Appeals.

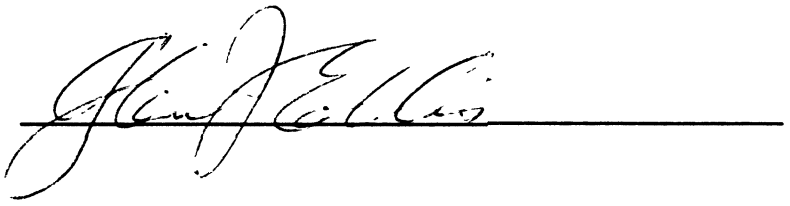
Respectfully submitted this 4th of October, 1989.



Glen J. Ellis, for Defendant

MAILING CERTIFICATE:

I hereby certify that I mailed ten copies of the foregoing Defendants Brief to the Clerk of the Utah Court of Appeals, 400 Midtown Plaza, 230 South 500 East, Salt Lake City, Utah 84102; and two copies to George W. Preston, Rich County Attorney, attorney for Respondent, 31 Federal Avenue, Ogden, Utah 84321, postage prepaid, in the U.S. Mail, this 4th of October, 1989.



The STATE of Utah, Plaintiff and Respondent,
v.
Richard Allen BRADSHAW, Defendant and Appellant.
No. 14060.

Supreme Court of Utah.
Oct. 16, 1975.

Defendant was convicted in the Fifth District Court, Beaver County, J. Harlan Burns, J., of intentionally interfering with a law enforcement official seeking to effect an arrest, and he appealed. The Supreme Court, Tuckett, J., held that the statute under which defendant was convicted was unconstitutionally vague.

Reversed and remanded for dismissal.

Henriod, C. J., filed a concurring opinion.

Ellett and Crockett, JJ., dissented and filed separate opinions.

Criminal Law ⇐13.1(2)

Statute making any person guilty of a misdemeanor when he "intentionally interferes with a * * * law enforcement official seeking to effect an arrest or detention of himself * * * regardless of whether there is a legal basis for the arrest" may be subject to various meanings and interpretations, fails to inform ordinary citizen who is seeking to obey the laws as to conduct sought to be proscribed, and therefore is unconstitutional as permitting arrest without probable cause and without lawful basis. U.C.A.1953, 76-8-305; Const. art. 1, § 14; U.S.C.A.Const. Amend. 4.

Michael W. Park, Cedar City, for defendant-appellant.

Vernon B. Romney, Atty. Gen., Earl F. Dorius, Asst. Atty. Gen., Salt Lake City, John O. Christiansen, Beaver County Atty., Beaver, for plaintiff-respondent.

TUCKETT, Justice:

After a trial de novo in the district court, defendant was found guilty of violating Sec. 76-8-305, U.C.A.1953, as amended, which reads as follows:

> A person is guilty of a class B misdemeanor when he intentionally interferes with a person recognized to be a law enforcement official seeking to effect an arrest or detention of himself or another regardless of whether there is a legal basis for the arrest.

The defendant was sentenced to serve six months in the county jail. From the verdict and sentence the defendant has appealed claiming that the statute above referred to is invalid on constitutional grounds.

The complainant is a policeman of Milford City, Beaver County, Utah, who observed the defendant driving an automobile on the streets of that city. The officer followed the defendant to a service station where he informed the defendant that he was going to issue the defendant a citation for driving while his driver's license was suspended. After the defendant had completed the purchase of gasoline he drove away from the service station a short distance to a hotel where he resided. The officer followed the defendant in a patrol car with the siren going. At the hotel, the officer informed the defendant that he was under arrest for resisting arrest, at which time the officer pulled his revolver from the holster. The defendant tapped the officer on the chest and told the officer that he did not have the guts to shoot, whereupon the defendant turned and entered the hotel. [illegible] the officer followed the defendant [illegible] the officer did not ask the defendant to produce a driver's license. The accusation that the defendant was operating an automobile during suspension was untrue, and the defendant did in fact have a valid driver's license.

It is doubtful whether or not the record supports the conviction of the defendant inasmuch as the officer made no effort

ADDENDUM #1

to take custody of the defendant, and it is doubtful whether or not the act of the defendant in simply ignoring the officer is an interference with him. On appeal we are only concerned, however, with the defendant's challenge to the statute. In passing we point out that the officer accused the defendant of violation of the Motor Vehicle Code, and the provisions of that code should have been followed by the officer in dealing with the purported violation. The provisions of Sec. 41-6-166, U. C.A.1953, are controlling in situations similar to the one herein. A pertinent part of that section is as follows:

> Whenever any person is arrested for any violation of this act punishable as a misdemeanor, the arrested person shall be immediately taken before a magistrate within the county in which the offense charged is alleged to have been committed and who has jurisdiction of such offense and is nearest or most accessible with reference to the place where said arrest is made, in any of the following cases:
>
> (1) When a person arrested demands an immediate appearance before a magistrate.
>
> * * * * * *
>
> (4) In any other event when the person arrested refuses to give his written promise to appear in court as hereinafter provided, or when in the discretion of the arresting officer, a written promise to appear is insufficient.

On appeal the defendant contends that the statute under which he was charged and convicted is invalid in view of the provisions of Article I, Section 14, of the Constitution, which reads as follows:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.

While the particular problem raised has not been before this court, the language of the Utah Constitution was taken verbatim from the language of the Fourth Amendment to the Constitution of the United States. The United States Supreme Court in dealing with the particular problem in the case of *Terry v. Ohio*,[1] at page 16 of the U. S. Reports, 88 S.Ct. at page 1877 had this to say: "It is quite plain that the Fourth Amendment covers 'seizures' of the person which do not eventuate in a trip to the station house and prosecution for crime—'arrests' in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." That case went on to hold that arrests without a warrant may only be made upon probable cause. Other decisions of the U. S. Supreme Court are to the same effect.[2]

The language of the particular statute we are here dealing with is undoubtedly subject to the constitutional challenge of vagueness. That part of the statute "regardless of whether there is a legal basis for the arrest" may be subject to various meanings and interpretations. If the intention of the legislature was to punish a law abiding citizen by incarceration because he did not willingly submit to an unlawful arrest, a statute authorizing the same is in violation of both the Utah and United States Constitutions as above referred to, unless punishment is authorized only for an arrest without probable cause and without lawful basis for the arrest. Likewise the word "interfere" as used in the statute without further definition or elabora-

1. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889.

2. *Henry v. U. S.*, 361 U.S. 98, 80 S.Ct. 168, 4 L.Ed.2d 134; *Wong Sun v. U. S.*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441; *Wright v. Georgia*, 373 U.S. 284, 83 S.Ct. 1240, 10 L. Ed.2d 349; *People v. Curtis*, 70 Cal.2d 347, 74 Cal.Rptr. 713, 450 P.2d 33.

tion may mean any protest or verbal remonstration with an officer as well as the employment of physical force to avoid an arrest. We are of the opinion that the language of the statute as above pointed out fails to inform an ordinary citizen who is seeking to obey the laws as to the conduct sought to be proscribed. The statute in the particulars above referred to is in violation of the Constitution of this State and the United States and therefore invalid.

This matter is reversed and remanded to the district court to dismiss the complaint.

MAUGHAN, J., concurs.

HENRIOD, Chief Justice (concurring).

I concur, the while conceding that this may be a close case, and that the arguments of the dissents about law and order and the integrity of the constabulary, are peals of optimism for a desired socio-political community. Nonetheless, I am convinced that they have neglected the liberty bell, whose chimes presumably reach the ears not only of the shackler but the shacklee, and presumably reflect each's constitutional prerogative of equality,—the hallmark of which is reasonableness. I take it that any set of circumstances that outdistances such sounds might be said to constitute a journey out of the realm of constitutionality as we understand it.

In this case the officer in the first instance said he was going to issue the defendant *a citation* for driving while his license was suspended. He did not arrest him, or threaten him with an arrest. Millions of citations are issued daily without an arrest. The defendant did not object to a citation, nor did he resist an arrest at that time, but drove away a short distance followed by the officer, who arrested him, claiming he resisted arrest,—not borne out by the facts.[1]

The confrontation here was attended by the officer drawing his pistol,—necessary perhaps, in a television scenario, but hardly under the circumstances of this case. True it is, as the dissent urges, that the circumstances of a case may have nothing to do with the constitutionality of a statute, but they may have everything to do with the question of unconstitutionality of a statute applicable to the facts and basic issue here. They had a lot to do with Hitlerism, and in my opinion, the subject statute conceivably may be knocking at the door of some such eventuality. In such case I differ with my dissenting learned colleagues to the effect that the prevailing presumption is in favor of constitutionality justifying a six-month stretch in jail. In my book, where there is a statute that sanctions an arrest of a citizen by a "recognized" law enforcement officer, popularly looked upon as a person in a blue, brass-buttoned suit, ornamented with a silver star over his heart (but who may be an imposter in rented garb), which citizen is minding his own business, as here, where the non-interference was not flagrant but simply by driving away, "regardless of *whether there is a legal basis for the arrest* or not, as was the case here, but be unconstitutional. In such case, the presumption in favor of constitutionality successfully is rebutted, and as generally is the rule, disappears, and the presumption of innocence that always attends a defendant, destroys the former, the latter to persist. Facts well may be instrumental in its persistence.

The dissents say there is no constitutional question here since there is no search and seizure problem involved. The main opinion points to *Terry v. Ohio*[2] and other authorities[3] that seem to disagree,—which authorities have my preference over such unsupported generality.

1. One of the dissents suggests that we must ignore the facts, they being the function of the jury. Another suggestion seems apropos that without the facts, the unconstitutionality of a statute is a subject only of a declaratory judgement that ignores the fact of constitutional right of liberty.

2. Footnote 1, main opinion.

3. Footnote 2, main opinion.

I respectfully disagree with the gratuity in one of the dissents to the effect that "Nowhere in the statute can it be found that an unreasonable arrest is permitted or encouraged." I suggest the subject statute both permits *and* encourages an unreasonable—and I think, unconstitutional—arrest when it says it is unlawful to interfere with a law enforcement officer making an arrest. It is a legal basis for the [illegible]. In other words, a peaceful citizen is forced by legislation to become his own jail bait if he "interferes" with a law enforcement official making an arrest, no matter how outrageous, vicious, or illegal it may be—and it seems that the statute seems by implication or legerdemain, to be an arbitrary exercise of poor judgment, but in doing so interferes with an officer, —it costs him six months deprivation of his liberty.

Consider also [illegible] where a drunken officer [illegible] a teenager to the point [illegible] or where a drunken officer with a badge [illegible] and beating a perfectly innocent citizen, or where [illegible] at a football stadium goes berserk and at the [illegible] to arrest everyone in front of him, or engages [illegible] area, out of sheer [illegible] a lunatic minding his own business, or an off-duty [illegible] in civilian clothes, but "recognized" as a Robbin tries to arrest on a trumped up charge —or [illegible] who had a valid license, [illegible] whatever except to touch his fellow townsman, an officer, and actually walked away from an incident that the officer, not he, created.

The facts and hypothetics recited here are not for the purpose of deciding this case on the facts, which one of the dissents erroneously said we *could* do, but to demonstrate the vagueness of the statute, and the door it opens ostensibly, on a pretext of false constitutionality, to events leading to an unconstitutional invasion of the constitutional right against unreasonable seizure, a guaranteed right of privacy and a constitutional assurance of right of free locomotion and freedom from harassment and incarceration,—all in virtue of a statute that presents a ridiculous discrimination in favor of a law enforcement official and against an amenable law-abiding citizen who becomes a jailbird at the expense of the latter, and what is worse, the illegal act of the arresting official. To me this adds up to an Eleventh Commandment, to go hence and defy the law hiding behind a badge, and let him who is without sin, but interferes in the lawlessness, to serve the sentence.

It seems to me to be somewhat of a departure from reality and practicality and even morality to say a statute is constitutional that says one person can violate the law and by virtue of such illegal act induce another to indulge in a confrontation which he did not seek and get six months because a possible tormenter, acting illegally, goaded him into it. It is a rather superficial answer to say, as do the dissenters here, that having perhaps unwittingly "interfered" in an arrest, with the sometimes ludicrous and chameleonic meaning that

4. Which could be numbered in the dozens, such as sheriffs, deputies, city policemen, town policemen, school crossing guards, constables, town marshals, judges of various hues, game wardens, treasury agents, tax collectors, campus policemen, truant officers, forest rangers, justices of the peace, district court judges, Supreme Court Justices, sanitarians, agricultural agents, special police, meter maids, etc., ad infinitum.

5. "Interferes" carries with it a multiple connotation so vague as to render a statute unconstitutional, in my opinion. Does one interfere with an officer if he heckles him, refuses to leave the scene of a demonstration in which a person is being arrested, is a curiosity seeker at a fire where a suspected arsonist is being apprehended, a physician attempting to administer to a dying man who is being arrested, etc.?

someone "might" attach to the word, the "interferer," acting in good faith, not having read this funny statute, should be content to lose his job, his good name in the community, his liberty for six months, and his respect for the establishment, in exchange for the great privilege of hiring a lawyer, going to court to seek damages (which are no substitute for loss of freedom),—all because one of the countless hordes of law enforcement officials not only committed a pediculous, but illegal rip-off in making what is worse, the arrest of a person who at common law had a perfect [redacted] and who, but for this paternalistic, autocratic legislation in a free society, could resist arrest, and who as of now, *can* resist arrest if it happens to be classified as a *citizen's* arrest.

This statute does not have any semblance of a reasonable, constitutional statute prefaced by a warning requirement of some kind, a reasonable request that the citizen show something, or that under the circumstances "probable cause" appears to justify an arrest, or "that there is reason to believe an offense has been or is about to be committed."

One of the dissents asserts that it appears that the majority "is influenced by the facts of the case and seeks an impermissible way to correct what it considers a bad verdict." Although this statement may be permissible gratuity as to others in the majority triumvirate, it is not so as to this author, since he was influenced by the provisions of the statute [redacted] tionally [redacted] I consider [redacted]

One of the dissents suggests that "The main opinion is at some pains to explain how the police officer could have handled this apparently arrogant and belligerent defendant in a different manner." It does not take much imagination to answer that question. The [redacted] checked with the Motor Vehicle Department, to determine if his fellow townsman had a valid license, in which event he would have found that he did have such license. Or he calmly could have handed a citation to defendant or placed it on his car, or left it at his home, or mailed it to him. It is suggested that the dissent "is at some pains" to explain why the officer did not do one of the things mentioned above, or why impetuous, unreasonable police officer threatened the defendant by drawing his gun and why he committed a breach of the peace in the process of what proved to be an unlawful arrest, all the prevention of which the dissents both say was the very purpose of the statute they say is salutary in *keeping* the peace.

In passing, it is noted that neither of the dissents cites any authority that really supports the rule provided in the statute here. One, *Miller v. State,* a 1969 Alaska case (462 P.2d 421), at first blush would seem to. It may be pointed out, however, that the court there laid down a rule of law having no codification, which was similar to the provisions of our statute, saying that at least one state court had recommended such a rule as a matter of its common law development, being *State v. Koonce*, 89 N.J.Super. 169, 214 A.2d 428, 1965,—an intermediate court but not the court of last resort, the New Jersey Supreme Court. However, the *Miller* case, supra, pulled its punches on any constitutionality question, which was not even raised in the case, when it said "It should be noted that the rule we formulate today has no application when the arrestee apprehends bodily injury or when an unlawful arrest is attempted by one not known to be a peace officer. Quite different problems are then present." On the strength of such hedging, it is suggested that this case, the only one cited in the dissent, certainly would be undispositive in an attack on a statute's constitutionality on the ground of vagueness.[6]

6. Two other cases cited in the dissent, *Rosenberg v. State*, and *State v. Byrne*, are Florida cases decided in Appellate Division Courts, inferior courts not having the authoritative weight of the Florida Supreme Court, having the same subordinate stature of *State v. Koonce*, supra.

I am of the opinion the statute cannot stand a true test of constitutionality based either on a claim of 1) vagueness or 2) unreasonable seizure.

ELLETT, Justice (dissenting).

I can agree that there was no basis for [redacted], but cannot agree that the statute is contrary to the provision of our constitution. It does not permit an unlawful seizure (arrest). It merely transfers the right of redress for a wrongful arrest to the orderly procedure of a court trial instead of a brawl in the streets.[1]

The question of lawfulness of an arrest may be a close one, and a brawl may result in a killing. The legislature was wise in passing the statute in question in the interest of maintaining order and preventing confrontations which might lead to bloodshed. Nowhere in the statute can it be found that an unreasonable seizure (arrest) is permitted or encouraged. There is no change in the law that one making an unlawful arrest must answer for it, and so there is no basis for saying the statute conflicts with the Constitution.

The common law gave a person the right to resist an unlawful arrest, but times have changed since the time when self-help was permitted to prevent a wrongful arrest. At common law, arrests were often made by citizens. Judges were not available for speedy release on bond, and trials were long delayed. Such conditions no longer exist. An arrested person must be taken forthwith before a magistrate and trials must not be [redacted] and ant is entitled to bail in a reasonable amount.[3] Besides the statute does not prevent resistance to an unlawful arrest when made by a private person. It only applies to arrests made by a known police officer.

By both our constitution[4] and statute,[5] the ruling of the district court in cases appealed from a justice of the peace court is final except as to cases involving the constitutionality of a statute.[6] This matter is such a case, and so we must limit our review to the determination of whether the statute is invalid. We may not review the facts of the case.

It appears that the prevailing opinion is influenced by the facts of the case and seeks an impermissible way to correct what it considers a bad verdict.

That is the function of the trial court—not that of an appellate tribunal. If we wish to be jurors, we should renounce our position as justices and wait until our names are drawn for jury service.

In reviewing a statute to ascertain its constitutionality, certain rules of construction must be applied:

(a) A legislative enactment is presumed to be valid and in conformity with the constitution.[7]

(b) It should not be held to be invalid unless it is shown beyond a reasonable doubt to be incompatible with some particular constitutional provision.[8]

(c) The burden of showing invalidity of an ordinance or statute is upon the one who makes the challenge.[9]

1. *Miller v. State*, 462 P.2d 421, 426 (Alaska 1969); *Rosenberg v. State*, 264 So.2d 68; *State v. Byrne*, 311 So.2d 764; See Annotation in 44 A.L.R. 3rd at p. 1087 for cases holding it a crime to resist a known officer when making an arrest even absent a statute like ours.

[redacted]

3. Art. I, Sec. 9, Utah Const.

4. Art. VIII, Sec. 9, Utah Const.

5. Sec. 78-3-5, U.C.A.1953.

6. *Eureka City v. Wilson*, 15 Utah 53, 48 P. 41, affd. 173 U.S. 32, 19 S.Ct. 317, 43 L.Ed. 603 (1897); *State v. Holtgreve*, 58 Utah 563, 200 P. 894, 26 A.L.R. 696 (1921); *American Fork City v. Robinson*, 77 Utah 168, 292 P. 249 (1930).

7. *Trade Commission v. Skaggs Drug Centers, Inc.*, 21 Utah 2d 431, 446 P.2d 958 (1968); *Snow v. Keddington*, 113 Utah 325, 195 P.2d 234 (1948).

8. Cases cited note 1 supra.

9. *Trade Commission v. Skaggs Drug Centers, Inc.*, supra note 7.

In the case of *State v. Packard*[10] it was said:

> It is recognized that statutes should not be declared unconstitutional if there is any reasonable basis upon which they may be sustained as falling within the constitutional framework [citations omitted], and that a statute will not be held void for uncertainty if any sort of sensible, practical effect may be given it. [Citations omitted].

The Supreme Court of the United States in *Roth v. U. S.*[11] said:

> . . . This Court, however, has consistently held that lack of precision is not itself offensive to the requirement of due process. ". . . [T]he Constitution does not require impossible standards"; all that is required is that the language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices . . . ." *United States v. Petrillo*, 332 U.S. 1, 7–8, 67 S. Ct. 1538, 91 L.Ed. 1877.

The case of *Sunset Amusement Co. v. Board of Police Commissioners of City of Los Angeles*[12] is in point:

> . . . It should be kept in mind that there are an infinite variety of activities or conduct which could result in potential or actual danger to the "peace, health, safety, convenience, good morals, and general welfare" of the public. A municipality cannot reasonably be expected to isolate and specify those precise activities or conduct which are intended to be proscribed. As stated in *Daniel* [*Daniel v. Board of Police Com'rs,* 190 Cal.App.2d 566, 12 Cal.Rptr. 226] quoting from an earlier case, "To make a statute sufficiently certain to comply with constitutional requirements [of due process of law] it is not necessary that it furnishes detailed plans and specifications of the acts or conduct prohibited." . . .

The author of the prevailing opinion apparently doubts that the statute violates the constitutional provision regarding unreasonable seizures as *claimed by the appellant.* He seems to buttress the decision on the constitutional challenge of *vagueness.* This claim is personal to the author of the opinion, and was not raised either at trial or on appeal.

I can see nothing vague about the language of the statute in question. Any person of ordinary intelligence should know that when a known officer is making, or attempting to make, an arrest, self-help or lay interference is prohibited by the law.

In my opinion the statute is not unconstitutional, and we are duty bound to so say and to affirm the judgment.

CROCKETT, Justice (dissenting).

With due respect to our disagreeing colleagues, I am impelled to state that the majority opinion impresses me as a strained effort to cast the statute in a light different from its true intent and meaning for the purpose of making it appear to be unconstitutional and striking it down. It is my judgment that such a ruling is contrary to sound principles of law and considerations of policy. In addition to the cogent and correct observations of Justice Ellett, including: that a legislative enactment should not be so nullified unless it is violative of some constitutional provision beyond a reasonable doubt, I offer some further comments.

First, I re-emphasize that this statute *does not authorize a peace officer to make*

10. 122 Utah 369, 373, 250 P.2d 561, 563 (1952).

11. 354 U.S. 476, 491, 77 S.Ct. 1304, 1312 1 L.Ed.2d 1498 (1956).

12. 7 Cal.3d 64, 101 Cal.Rptr. 768, 773, 496 P.2d 840, 845 (1972).

an unlawful arrest. Nor does it authorize the *seizure* of any person or property. It does not deal with when or under what circumstances the lawful arrest may be made. That subject is dealt with elsewhere in the law.[1] Neither does it in any way adversely affect or deprive any person who is subjected to an improper or unlawful arrest of any right or remedy he has always had under the law. It seems inescapably plain to me that the *sole purpose of this statute is to safeguard against interference with a peace officer who is attempting to make an arrest,* to the end that violence may be avoided.

This statute may be different than you or I, or the other justices of this court may desire it to be, or would have drafted it, had that been their responsibility. But I certainly do not think it is beyond the realm of rationality to see it as the expressed will of the people of this State, acting through their legislature, that when any duly authorized peace officer is attempting to make an arrest, no citizen should interfere with him. If the arrest proves to be improper or unlawful, whoever is aggrieved thereby is not without the remedies the law gives him, both in that case if it comes to court, and/or in another if he wants to sue. All this statute does is to make it a misdemeanor if he presumes to judge the lawfulness of the arrest, and interferes with the officer in the performance of his duty.

In considering whether it is within the power of the state legislature to enact such a statute it is important to have in mind that, as contrasted to the federal government, which has only those powers expressly granted to it, the legislature of this State has all of the powers of sovereignty, except only as expressly limited or prohibited by the constitution.[2] It therefore has the power to enact any law or regulation calculated to preserve the peace and good order of the citizenry, unless some constitutional provision prohibits it.

The provision of our Constitution quoted and relied on as nullifying the statute is Section 14, Article I, relating to *searches* and *seizures.* It is submitted that if that section is considered in its total context, as rules of construction require, it will be seen that the purpose of that section is in accordance with its title "Unreasonable *searches* forbidden—Issuance of warrant"; and that it is dealing with the invasion of privacy by unreasonable searches and seizures of persons, houses, papers and effects and when the issuance of a warrant is necessary for that purpose, and not with the matter of making an arrest of the nature involved here. I therefore do not see how that constitutional provision can properly be regarded as preventing the legislature from enacting a peace and good order statute such as the one in question, nor how it has any application to the situation dealt with in this case.

We should look at the composite of this fact situation in a light supportive of the jury verdict, approved by the trial court in his denial of motion to set it aside. But, let it be conceded that the police officer may have been mistaken concerning the defendant's having a revoked driver's license. The main opinion is at some pains to explain how the police officer could have handled this apparently arrogant and insolent defendant in a different manner. It wholly ignores the proposition that if this defendant had not been a person of that disposition, and if he had a valid driver's license on him as the law requires, he could

1. See Title 77, Ch. 13, Utah Code Ann.1953.

2. To avoid repetition on this subject here, see statement in *Wood v. Budge,* 13 Utah 2d 359, 374 P.2d 516, and authorities therein cited.

have avoided any difficulty for himself or the police officer by simply so stating and exhibiting the license. But he chose the contrary course which resulted in the difficulty in which he finds himself.

I cannot see it as consistent with my judicial duty in the light of what I regard as correct principles of law and sound policy to align myself with the position of this defendant who obviously manifests a disposition to flout the law and authority, and place the burden of exemplary behavior on the peace officer who is trying to enforce and uphold it. It is my impression that, quite different from the view taken by the jurors and the trial judge, the possibility exists that some members of the court may view the fact situation in this case as offensive to their sense of justice. If this be so, and the ends of justice require overturning the verdict, this court could very well do so by deciding that the peace officer was wrong and that there was no justification for finding that the defendant was "interfering" with the peace officer making an arrest. I could not agree with that solution, believing that to be the prerogative of the jury and the trial court. But in my judgment that would be a solution more nearly rational and in conformity with proper judicial function and prerogative than to strike the statute down to rectify one seemingly harsh case. This would also be in harmony with the well-established principle of constitutional law: that the court should not declare a statute unconstitutional if the case can be decided on other grounds.[3]

In any event, it should be indicated that it is unconstitutional only as applied when a person resists arrest as to himself or his family, and not remove its effect from other situations where its salutary purpose should be preserved.

The STATE of Utah, Plaintiff and Respondent,

v.

Lewis A. BANKS, Jr., Defendant and Appellant.

No. 13996.

Supreme Court of Utah.

Oct. 2, 1975.

Defendant was convicted after trial by jury in the Third District Court, Salt Lake County, Gordon R. Hall, J., of aggravated assault. Defendant appealed. The Supreme Court held that it was not error to admit into evidence a pistol which had been seized in close proximity to where defendant was arrested and which was sufficiently similar to the gun used that gun admitted into evidence could serve for illustrative purposes.

Affirmed.

1. Criminal Law ⇐404(4)

In prosecution wherein defendant was convicted of aggravated assault, it was not error to admit into evidence pistol which had been seized in close proximity to where defendant was arrested and which was sufficiently similar to gun used that gun admitted into evidence could serve for illustrative purposes. U.C.A.1953, 76–5–102(1)(c), 76–5–103(1)(b), (2).

2. Searches and Seizures ⇐3.3(5)

Where gun was found in close proximity to where defendant was arrested, officers had right to take it for their own protection.

Jack W. Kunkler, Salt Lake Legal Defender Assn., Salt Lake City for defendant and appellant.

Vernon B. Romney, Atty. Gen., Earl F. Dorius, Asst. Atty. Gen., Salt Lake City for plaintiff and respondent.

3. See *Heathman v. Giles*, 18 Utah 2d 368, 374 P.2d 839; 16 Am.Jur.2d 301.

STATE of Utah, Plaintiff and Appellant,

v.

Adolfo Diaz MENDOZA, Defendant and Respondent.

STATE of Utah, Plaintiff and Appellant,

v.

Alberto Ruiz MENDIETA, Defendant and Respondent.

No. 20922.

Supreme Court of Utah.

Dec. 1, 1987.

Evidence obtained during search of car was suppressed by the Fifth District Court, Washington County, J. Harlan Burns, J., and the State appealed. The Supreme Court, Durham, J., held that: (1) there was no reasonable suspicion for border patrol officers to stop north bound vehicle containing "Latin-appearing" occupants and displaying California license plates; (2) good-faith exception to exclusionary rule cannot apply to investigatory stop and search; and (3) the Fourth Amendment Enforcement Act is unconstitutional.

Affirmed.

Zimmerman, J., filed a concurring opinion.

Hall, C.J., and Howe, J., filed separate concurring and dissenting opinions.

1. Aliens ⇐53.8

Border patrol officers' stop of vehicle on interstate highway was not supported by reasonable suspicion based on apparent "Latin descent" of occupants, route of travel, time of day, time of year, California license plates, "erratic" driving behavior in that vehicle did not immediately vacate left lane when officers approached at high speed then, after being tailed at distance of two to six feet, switched to right lane and suddenly slowed down, and subsequent nervous behavior of occupants. U.S.C.A. Const.Amend. 4.

2. Criminal Law ⇐394.4(2)

Good-faith exception to exclusionary rule can never apply to investigatory stop and search in that, if no reasonable suspicion exists to justify investigatory stop, officer's conduct was not reasonable within meaning of the exception and, in any event, exception cannot operate where no outside authority on which officers reasonably relied expressly authorized the search. U.S.C.A. Const.Amend. 4.

3. Criminal Law ⇐394.4(2)
Searches and Seizures ⇐12

The Fourth Amendment Enforcement Act is unconstitutional in purporting to create a "good faith" exception to exclusionary rule with respect to investigatory stops. U.C.A.1953, 77-35-12(g); U.S.C.A. Const.Amend. 4.

4. Criminal Law ⇐394.4(2), 394.5(4)
Searches and Seizures ⇐12

Even where "good faith" exception to exclusionary rule is applicable, the Fourth Amendment Enforcement Act is unconstitutional, both in shifting burden of proof to defendant to prove police conduct in bad faith and in requiring illegal conduct that goes beyond being objectively unreasonable. U.C.A.1953, 77-35-12(g), (g)(2)(i, ii); U.S.C.A. Const.Amend. 4.

David L. Wilkinson, David B. Thompson, Salt Lake City, Peter L. Rognlie, St. George, for plaintiff and appellant.

J. MacArthur Wright, John Miles, St. George, for defendant and respondent Mendoza.

John E. Meyers, Los Angeles, California, for defendant and respondent Mendieta.

DURHAM, Justice:

The State brought this appeal to challenge the trial court's suppression of evidence obtained during a search of the car in which defendants were traveling. The State assigns as error the trial court's use of a probable cause standard to determine the validity of the stop, the trial court's

finding that defendants had standing to challenge the validity of the search, and the trial court's failure to make findings pursuant to Utah Code Ann. § 77-35-12(g) (1982). We affirm.

The following summary of the facts is based on testimony from both the suppression hearing and the preliminary hearing. The trial judge relied on testimony from both in granting the motion to suppress.

On March 16, 1985, two United States Immigration Service border patrol officers observed the northbound traffic on I-15 south of St. George, Utah, from a car parked on the median for that purpose. Their car was green, with official decals on both doors and a light bar mounted on the roof. At approximately 4:50 a.m., three cars approached the officer's position, including the black Mustang in which defendants were traveling. Officer Stiegler testified that his partner, Officer Fox, told him that the car deserved a closer look because the occupants appeared to be of Latin descent. Officer Fox, however, testified at the suppression hearing that he could not remember making the statement concerning defendants' apparent ethnic origin.

Officer Fox, the driver of the border patrol car, pulled onto the highway and began to pursue the black Mustang. In order to catch up with it before it reached a rest stop, where the officers could view the car and its passengers with the aid of roadside lights, the officers followed the Mustang at high speed. When they caught up with defendants' vehicle, it failed to leave the left lane despite the officers' rapid approach; however, neither officer could testify that the occupants of the Mustang had seen the officers' car approach. The officers matched the Mustang's speed and followed at a distance of two to six feet. The officers then noticed that the Mustang had California license plates.

The Mustang eventually pulled into the right lane and decelerated rapidly. Both officers described the car's movements as "jerky." The officers pulled alongside the Mustang, dropped back, and then pulled alongside the car again. With the aid of the lights from the rest stop, the officers determined that defendants appeared to be of "Latin descent" and behaved "nervously." When asked to describe defendants' behavior more specifically, however, the officers testified only that defendants avoided eye contact with the officers. Based on the time of year, the California license plates on the car, defendants' "nervous" behavior, defendants' physical characteristics, and the "jerky" driving, the officers decided to pull the Mustang over and question defendants concerning their citizenship status.

The officers questioned both defendants, and neither was able to produce adequate identification. The officers arrested defendants and placed them in the back of the officers' car. At this point, the officers opened the trunk of the Mustang to determine if it contained any other passengers and discovered the fifty-one bags of marijuana that were the subject of the motion to suppress.

We consider first the propriety of the initial stop. The State contends that the trial judge improperly assessed the validity of the stop under a probable cause standard instead of the appropriate "reasonable suspicion" standard. The plain language of the suppression order does not, however, support the State's position. The order reads, "[T]here were no (articulable) facts as a basis *or* probable cause for the stop." (Emphasis added.) Use of the disjunctive indicates that the trial judge found not only a lack of probable cause, but also a lack of any basis whatsoever for the stop. The transcript of the trial court's ruling supports this interpretation. The transcript indicates that the trial judge found "there was no basis for the original stop," without making any reference to a lack of probable cause. Although inclusion of the probable cause language in the order confuses the standard applied by the trial court, that language does not indicate that the trial judge suppressed the evidence in question solely because the facts failed to meet the more restrictive probable cause standard.

[1] Even under the "reasonable suspicion" standard announced in *United States v. Brignoni-Ponce*, 422 U.S. 873, 884, 95

S.Ct. 2574, 2581, 45 L.Ed.2d 607 (1975), the facts known to the border patrol officers at the time they stopped the Mustang did not justify the stop. In *Brignoni-Ponce*, the United States Supreme Court reviewed the propriety of a stop, based solely on the "Mexican" appearance of a vehicle's three occupants, to investigate the possible transportation of illegal aliens. The Court held, "Except at the border and its functional equivalents, officers on roving patrol may stop vehicles only if they are aware of specific, articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country." *Id.* The sole fact relied upon by the border patrol officers in *Brignoni-Ponce* was the "apparent Mexican ancestry" of the vehicle's occupants. *Id.* at 885–86, 95 S.Ct. at 2582–83. The Court held that apparent Mexican ancestry alone did not furnish "reasonable grounds to believe that the three occupants were aliens." *Id.* at 886, 95 S.Ct. at 2582.

In *Brignoni-Ponce*, the Court listed several factors for consideration in determining if the officers had reasonable suspicion to justify the stop of the suspect vehicle: (1) the characteristics of the area, including its proximity to the border, usual traffic patterns, and previous experience with alien traffic; (2) information concerning recent border crossings in the area; (3) the driver's behavior, including erratic driving or an obvious attempt to evade officers; (4) the characteristics of the vehicle itself, such as its size and observations indicating that the vehicle is heavily loaded; (5) whether the occupants of the vehicle are trying to conceal themselves; and (6) whether the occupants have a characteristic Mexican appearance, i.e., particular style of haircut or dress. The officer is entitled to assess the facts available to him in light of his experience. *Id.* at 884–85, 95 S.Ct. at 2581–82. In determining whether the facts support a reasonable suspicion that a vehicle is engaged in illegal activity, the trial court must consider the totality of the circumstances facing the officers. *United States v. Cortez*, 449 U.S. 411, 417–18, 101 S.Ct. 690, 694–95, 66 L.Ed.2d 621 (1981). The reviewing court should not overturn the trial court's determination unless it is clearly erroneous. *Id.* at 416; *see also State v. Gallegos*, 712 P.2d 207, 208–09 (Utah 1985). A review of the facts in this case indicates that the trial judge's order suppressing the questionable evidence was not clearly erroneous.

The officers in this case relied on the following facts in determining that they had a reasonable suspicion justifying the stop of the Mustang: (1) the apparent "Latin descent" of the occupants of the Mustang; (2) the route of travel; (3) the time of day; (4) the time of year; (5) the California license plates; (6) the erratic driving pattern; and (7) the nervous behavior of the occupants.

As to the first factor, Officer Stiegler simply testified that the occupants of the Mustang appeared to be of "Latin descent." He did not identify any characteristics observed before the stop, such as clothing or haircut, that would indicate Mexican nationality. Many United States citizens and residents have physical characteristics that might be classified as Latin. Without other observations concerning physical characteristics that would indicate alien status, Latin appearance has only minor probative value in determining if a suspect has entered the country illegally.

Likewise, the Mustang's route of travel and California license plates have little probative value in determining if the officers had a reasonable suspicion to stop the vehicle. The officers testified that I-15 is frequently used by those involved in transporting illegal aliens from the California-Mexico border to destinations north and east of California. However, I-15 is also the only major interstate highway for legal traffic to locations northeast of Southern California. It seems unlikely that illegal alien transporters comprise a significant portion of interstate traffic on I-15 at distances as far from the Mexican border as St. George, Utah.

Similarly, the time of year and the time of day of the stop have little relevance. Although the density of the traffic on I-15 varies, travelers use the interstate highway

at all times of the day and night and at all times of the year. *See, e.g., United States v. Shields*, 534 F.2d 605, 608 (5th Cir.1976). *But cf. United States v. Quiroz-Carrasco*, 565 F.2d 1328, 1330 (5th Cir.1978) (defendants stopped on a road at a time when virtually no local traffic was present).

The officers also testified that they relied on defendants' erratic driving behavior in deciding to stop the Mustang. When asked to describe this behavior more specifically, however, they merely cited defendants' initial failure to yield the left lane to the approaching patrol car and their subsequent lane change and rapid deceleration. We do not see how this behavior would give rise to a suspicion that the occupants of the car were engaged in illegal activity. Defendants made no attempt to evade the officers; rather, they changed lanes and slowed down. If anything, defendants' conduct facilitated their apprehension by the officers.

The final fact relied upon by the officers was defendants' "nervous behavior." When asked to describe defendants' behavior more specifically, the officers merely stated that defendants' had a "white-knuckled" or rigid look and failed to make eye contact. The Fifth Circuit Court of Appeals has held that the failure to make eye contact can have no weight in determining if the officers had a reasonable suspicion to conduct an investigatory stop. *United States v. Pacheco*, 617 F.2d 84, 86–87 (5th Cir.1980); *United States v. Lopez*, 564 F.2d 710, 712 (5th Cir.1977).

Additionally, several of the factors listed in *Brignoni-Ponce*, 422 U.S. at 885–86, 95 S.Ct. at 2582–83, are absent here. Defendants did not try to evade the officers, nor did they attempt to conceal anyone or anything when the officers began pursuing the Mustang. The car did not meet the typical profile of a vehicle used for smuggling, nor was there any indication that the vehicle was heavily loaded. *See United States v. Garcia*, 732 F.2d 1221, 1224–25 (5th Cir. 1984) (several factors including the appearance of the occupants and the heavily loaded truck were sufficient to uphold an investigatory stop). Finally, the officers stopped the car a considerable distance from the Mexican border.

Adopting the State's position would essentially authorize the stop of all northbound vehicles on I–15 containing "Latin-appearing" occupants and displaying suspect state license plates.[1] Such a holding would substantially interfere with the fourth amendment rights of those travelers. We hold that the facts in this case do not support a reasonable suspicion that defendants were engaged in illegal activity; therefore, the trial court's finding that the stop violated defendants' fourth amendment rights was not clearly erroneous.

Our holding that the investigatory stop violated defendants' fourth amendment rights obviates the need to discuss the propriety of the search. Because we find the stop itself unconstitutional, all evidence subsequently seized is inadmissible. *See, e.g., Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); 4 W. LaFave, *Search and Seizure* § 11.4(d), at 407–08 (2d ed. 1987).

Our holding as to the unconstitutionality of the initial stop also eliminates the necessity to address the standing issue. Because the State based its standing argument on the propriety of the search, and because the validity of the search does not affect our holding, we do not discuss defendants' standing to challenge the search.

We next turn to the State's challenge to the trial court's failure to make the findings required by Utah Code Ann. § 77–35–12(g) (1982), part of the Fourth Amendment Enforcement Act. Pursuant to that section, a trial court may only suppress evidence when it finds a substantial fourth amendment violation that was not made in good faith. A defendant must first prove a substantial violation by a preponderance of the evidence. The State must then prove good faith on the part of the police officer in order to prevent sup-

1. The officers testified that license plates from other states on the United States–Mexico border, as well as those from states that are the typical destinations for illegal alien traffic, would have aroused their suspicion.

pression of the evidence. The section further requires the trial court to state its reasons for finding a substantial violation and a lack of good faith. In considering this assignment of error, we first determine whether section 77-35-12(g) meets federal constitutional standards.

In *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), the United States Supreme Court applied the exclusionary rule to the states by virtue of the fourteenth amendment. *Id.* at 655, 81 S.Ct. at 1691. As a result, the United States Constitution requires suppression of evidence seized pursuant to a search or seizure made in violation of the fourth amendment. In *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), however, the Court created an exception to blanket application of the exclusionary rule. The Court held that the rule does not apply where the state establishes that an officer exhibited "objectively reasonable" reliance on a magistrate's probable cause determination and on the technical sufficiency of the search warrant issued. *Id.* at 922-23, 104 S.Ct. at 3420-21.

Although *Leon* involved a search conducted pursuant to a subsequently invalidated warrant, the State argues that the *Leon* holding does not restrict application of the "good faith" exception to warrantless searches. Admittedly, much of the language in *Leon* intimates a broader application of the rule. While the State correctly argues that no language in the *Leon* opinion specifically restricts application of the exception to searches pursuant to a warrant,[2] we do not agree that it can apply to warrantless searches of the kind involved in this case.

The basis for the *Leon* exception is that the exclusionary rule serves no other purpose than to punish law enforcement officers for knowingly or negligently conducting a wrongful search and to deter such conduct in the future. *Id.* at 918-21, 104 S.Ct. at 3418-19. When, however, a police officer obtains a warrant and relies on it with objective reasonableness, exclusion of the evidence due to a subsequent invalidation of the warrant would serve no purpose. *Id.* Thus, the opinion's foundation is that excluding illegally-seized evidence when a police officer has received authorization to conduct a search, has restricted his search to the boundaries of the authorization, and has a reasonable basis for relying on the authorization would defeat the *ends of justice*.

[2] Whether or not we agree with the *Leon* view of the exclusionary rule's purpose, the exception cannot operate in this situation for two reasons. First, no outside authority on which the officers could reasonably rely expressly authorized the search of the vehicle; therefore, the policy foundations of the *Leon* exception do not appear in searches of the kind involved in this case.[3]

Second, the *Leon* exception, by its own terms, could never apply to an investigatory stop and search. As we have already discussed, *Brignoni-Ponce* permits the use of evidence obtained during a search conducted after an investigatory stop only

2. We note that much of the language in *Leon* suggests a broader application of the rule. For example, the Court states that the exclusionary rule should not apply to objectively reasonable police activity and that this is especially true where the officer has obtained a search warrant and acted within its scope. *Leon*, 468 U.S. at 919-20, 104 S.Ct. at 3418-19. This language implies that all objectively reasonable police conduct should enjoy immunity from the exclusionary rule and that obtaining a warrant has the effect of creating an even greater presumption of validity of the police activity as long as the officer obtained the warrant in good faith. Because the statute, by its terms, applies to all motions to suppress evidence without distinguishing between motions to challenge warrantless searches from motions to challenge searches conducted pursuant to a warrant, only the broader application of the "good faith" exception suggested in the *Leon* dicta can justify the scope of the statute.

3. In *Illinois v. Krull*, — U.S. —, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987), the United States Supreme Court extended the *Leon* exception to a situation where the police conducted a search pursuant to a subsequently invalidated statute. *Id.*, 107 S.Ct. at 1167. *Krull* does not affect our characterization of *Leon*. In both cases, the officers conducting the searches did so in objectively reasonable reliance on prior, external authorization.

when articulable facts give rise to a reasonable suspicion. *Brignoni-Ponce*, 422 U.S. at 884, 95 S.Ct. at 2581. In essence, this requires objectively reasonable conduct in the decision to search, the same objective reasonableness that an officer must exercise when relying on a subsequently invalidated search warrant. If no reasonable suspicion exists to justify an investigatory stop, rendering a subsequent search illegal, then the officer whose conduct is in question could not have acted reasonably. Thus, the *Leon* exception could never apply to an invalidated investigatory stop and search.

[3] Because *Leon* could never apply to investigatory stops and searches, and because the Fourth Amendment Enforcement Act purports to create a "good faith" exception to such searches, that Act violates the fourth amendment to the United States Constitution.

[4] Even assuming for the sake of argument that the "good faith" exception established by *Leon* applies to the type of search involved in this case, the statutes in question here are still unconstitutional. Section 77-35-12(g)(1) requires defendants to establish a substantial violation of their fourth amendment rights. A violation is "substantial" under section 77-35-12(g)(2) if

> (i) The violation was grossly negligent, willful, malicious, shocking to the conscience of the court or was a result of the practice of the law enforcement agency pursuant to a general order of that agency;
>
> (ii) The violation was intended only to harass without legitimate law enforcement purposes.

This threshold requirement is beyond the scope of the "good faith" exception for two reasons. First, *Leon* establishes an exception to the applicability of the exclusionary rule. *Leon*, 468 U.S. at 922, 104 S.Ct. at 3420. Pursuant to *Mapp*, if the defendant establishes a fourth amendment violation, the illegally-seized evidence must be suppressed regardless of the egregiousness of, or the intentions motivating, the police officers' conduct. *Mapp*, 367 U.S. at 655, 81 S.Ct. at 1691. Because *Leon* is an exception to the application of the exclusionary rule, the State must prove the necessary elements of the "good faith" exception. Section 77-35-12(g), however, shifts the burden of proof to the defendant, who must prove the equivalent of police conduct made in bad faith before the court can apply the exclusionary rule.

Subsections (i) and (ii) of section 77-35-12(g)(2) also exceed the bounds of the exception established in *Leon* because both require less than objectively reasonable conduct in order for section 77-35-12(g) to provide an exception. Pursuant to the broad reading of *Leon*, a court will not admit the illegally-seized evidence if it finds the police conduct objectively unreasonable. Conduct that is objectively unreasonable, however, is not equivalent to grossly negligent, willful, or malicious conduct; nor does it always arise from either an intent to harass or pursuant to department policy. Because subsections (i) and (ii) of section 77-35-12(g)(2) validate conduct that is not objectively reasonable under *Leon*, they are unconstitutional.

The state legislature indicated that if any part of section 77-35-12(g) was held invalid, the Fourth Amendment Enforcement Act would "be void in its entirety." H.B. 69, 44th Leg., Bud. Sess., 1982 Utah Laws ch. 10, § 16. Thus, our holding that the substantial violation requirement violates the fourth amendment of the United States Constitution renders invalid all of the statutes passed in the Fourth Amendment Enforcement Act. We therefore do not need to discuss the trial court's failure to make findings as to the officers' good faith.[4]

Because we affirm on other grounds the trial court's order suppressing the evidence, we do not reach the issues raised by defendants concerning a possible *Miranda* violation and the officers' lack of statutory authority to stop defendants.

4. The stop in this case and section 77-35-12(g) both fall below the standards required by the fourth amendment to the United States Constitution. We do not analyze the level of conduct required by Utah Constitution article I, section 14. We reserve this question for the future.

The decision of the trial court is affirmed.

STEWART, Associate C.J., concurs.

ZIMMERMAN, Justice: (concurring).

I join in the majority's analysis. However, I feel compelled to add several comments.

First, I find particularly outrageous the State's attempt to justify the stop of Mendoza and Mendieta by citing the fact that they reacted anxiously to the pursuit and surveillance conduct of the two INS officers. In the 4:50 a.m. darkness on March 16th, Mendoza and Mendieta were driving along I-15 in the left lane. Suddenly, a car approached from the rear at a very high rate of speed. When it approached the Mendoza/Mendieta vehicle, it abruptly slowed down and then trailed Mendoza and Mendieta at freeway speeds, separated from their rear bumper by only two to six feet. Only the headlights of the officers' car were illuminated. In the dark, there was nothing that would alert Mendoza and Mendieta that the vehicle behind them was a police car. Mendoza and Mendieta then pulled into the right lane and slowed down. At this point, they appeared "nervous" to the officers.

Any sane person would appear nervous if something like this occurred while traveling along a lonely stretch of one of our interstates in the early morning hours. I find ludicrous the State's argument that because these individuals appeared to have been unsettled by the officers' extraordinary conduct, the officers had justification for suspecting that something improper was going on, and on this basis, they were entitled to pull the vehicle over and institute an investigation that led to a search of the vehicle. This is pretextual fourth amendment gamesmanship at its worst.

Second, I agree with the majority that the "good faith" exception suggested in *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), cannot be applied generally to warrantless searches. However, even if this reading of *Leon* were in error, the Fourth Amendment Enforcement Act would not necessarily be saved. As I have observed previously in *State v. Hygh*, 711 P.2d 264, 271-74 (Utah 1985) (Zimmerman, J., concurring), the whole question of the protections that are afforded by and the remedies available under article I, section 14 of the Utah Constitution, our own search and seizure provision, has never been carefully considered by this Court.

HALL, Chief Justice: (concurring and dissenting).

Application of the clearly erroneous standard of review [1] prompts me to concur in affirming the judgment of the trial court. However, I reserve judgment as to whether the exclusionary rule as espoused in *United States v. Leon* [2] has application to a warrantless search. I also reserve judgment as to the constitutionality of Utah Code Ann. § 77-35-12(g) (1982) and whether it has application to a warrantless search.

HOWE, Justice: (concurring and dissenting).

I concur except I would not reach and determine the constitutionality of section 77-35-12(g), also known as rule 12(g), Utah Rules of Criminal Procedure. The majority correctly holds that the good faith exception to the exclusionary rule enunciated in *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), cannot apply to the warrantless search made in the instant case. For the same reasons and because of the inherent lack of good faith in their making, section 77-35-12(g) does not apply to such searches. *See* subparagraphs (3)(ii) and (iii) of section 78-35-12(g).

I would not attempt to apply the statute to a fact situation it was never intended to cover (warrantless search) and then because it is unconstitutional as there applied, declare the statute unconstitutional in all

1. Utah R.Civ.P. 52(a); *State v. Ashe*, 745 P.2d 1255, 1258 (Utah 1987).

2. 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

per had obtained a copy of the petition, including the first and final accounting, and had taken it to his legal counsel in Salt Lake City prior to the October 7, 1981, hearing. Appellants did not need to digest the entire 233-page document prior to the hearing to enable them to object. Pages one and two are a summary of the accounting in the form recommended by the probate division. The amount of the assets on hand for distribution is unambiguously written on the "bottom line" of the summary. This fact alone, in light of appellants' allegations of Zions' earlier representations regarding the value of the estate, should have sufficiently alerted them that something might be awry and caused them to appear at the hearing. If appellants did not agree with the amount shown on the summary, they had more than ample time to appear at the hearing and lodge an objection or ask for a continuance to study the document. Continuances of this type are given as a matter of course by the court in probate proceedings. Additionally, appellants had three months in which they could have moved for relief under Rule 60(b)(1) to (4). We acknowledge that the granting of a continuance is discretionary with the trial court and that "[t]he right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion." *Roller v. Holly*, 176 U.S. 398, 20 S.Ct. 410, 44 L.Ed. 520 (1900). In *Roller*, the United States Supreme Court set aside an 1891 default judgment on due process grounds, holding that five days' notice to Roller, a Virginia resident, to appear in a Texas court was insufficient to allow Roller to travel to Texas, hire an attorney, and prepare his case. However, in these days of efficient rapid transportation and relatively inexpensive telecommunications, we are less willing to allow distance alone to weigh heavily on our review of the adequacy of the notice. Here, Phillip C. Pepper had discussed Zions' petition with legal counsel in Salt Lake City prior to the hearing, but neither he nor his counsel appeared at the hearing to register any objection. Under these facts, appellants were not denied due process of law. Further, almost nine months expired before appellants raised their claim of lack of due process. Because Rule 60(b)(7) requires such a claim to be made within a "reasonable time," the trial court did not abuse its discretion in refusing to set aside the October 8, 1981, order.

Appellants also assert that notice to their mother, Fannie N. Pepper, was inadequate because she was legally incompetent, and Zions was aware of that. Although Phillip C. Pepper was appointed conservator for his mother by an Arizona court, he made no motion to join his mother in the petition. Nor is she a party to this appeal. Hence, we do not consider whether her due process rights were violated.

We hold that the court did not err in denying appellants' petition and in granting Zions' motion to dismiss. Affirmed. Costs to respondent.

HALL, C.J., STEWART and DURHAM, JJ., and DEAN E. CONDER, District Judge, concur.

ZIMMERMAN, J., does not participate herein; CONDER, District Judge, sat.

STATE of Utah, Plaintiff and Respondent,

v.

Gillis HYGH, Defendant and Appellant.

No. 19402.

Supreme Court of Utah.

Aug. 16, 1985.

Defendant was convicted in the Third District Court, Salt Lake County, Homer F. Wilkinson, J., of aggravated robbery, and he appealed. The Supreme Court, Hall, C.J., held that: (1) inventory search of de-

fendant's vehicle was not proper since it was pretextual and not conducted according to proper procedures, and (2) trial court did not abuse its discretion in limiting cross-examination of service station attendant who was robbed by limiting questioning concerning the exact method of activation of surveillance camera during robbery.

Reversed and remanded.

Zimmerman, J., concurred and filed opinion in which Durham, J., concurred.

1. Arrest ⇐71.1(1)
Searches and Seizures ⇐3.3(4, 7)

In order for a search to be constitutionally permissible, a search warrant issued by neutral magistrate and based upon probable cause is required unless search is within an exception to the warrant requirement such as: limited search incident to lawful arrest, search of an automobile based on probable cause that it contains contraband, or seizure of evidence in plain view by one with a lawful right to be in a position to so observe it. Const. Art. 1, § 14; U.S.C.A. Const.Amend. 4.

2. Searches and Seizures ⇐3.3(6)

An inventory search constitutes an exception to the warrant requirement; a warrantless search of an impounded vehicle for purposes of protecting police and public from danger, avoiding police liability for lost or stolen property and protecting owner's property is permitted by the State and Federal Constitutions. Const. Art. 1, § 14; U.S.C.A. Const.Amend. 4.

3. Criminal Law ⇐394.4(3)
Searches and Seizures ⇐3.3(1)

Contraband or other evidence of crime discovered in a true inventory search may be seized without a warrant and introduced into evidence at trial. Const. Art. 1, § 14; U.S.C.A. Const.Amend. 4.

4. Searches and Seizures ⇐3.3(1)

Inventory search exception to the warrant requirement does not apply when the inventory is merely a pretext concealing an investigatory police motive; fundamental constitutional guarantees against unreasonable searches cannot be evaded by labeling them "inventory" searches. Const. Art. 1, § 14; U.S.C.A. Const.Amend. 4.

5. Searches and Seizures ⇐3.3(6)

In order that an inventory search of a vehicle be lawful, there must have been reasonable and proper justification for the vehicle's impoundment, either through explicit statutory authorization or through circumstances surrounding the initial stop. Const. Art. 1, § 14; U.S.C.A. Const.Amend. 4.

6. Searches and Seizures ⇐7(29)

It is the state's burden to establish necessity for taking an inventory of a vehicle. Const. Art. 1, § 14; U.S.C.A. Const. Amend. 4.

7. Searches and Seizures ⇐3.3(6)

Search of automobile was not a valid inventory search, since it appeared to be a pretext for a warrantless search and officer did not follow prescribed procedures in that officer did not involve owner of vehicle, who was present, in his decision to conduct search, rather than permitting owner to make other disposition of vehicle, officer did not completely search the vehicle or make list of items found, and officer had sent another officer to retrieve photo of robbery suspect even before asking defendant for his license and registration, waited for photo before beginning search, and searched with picture in hand. Const. Art. 1, § 14; U.S.C.A. Const.Amend. 4.

8. Criminal Law ⇐662.7

Right to confrontation includes right to cross-examine witnesses; however, this right is not absolute, as trial court has discretion in limiting scope and extent of cross-examination which will not be reversed on review absent an abuse. U.S.C.A. Const.Amend. 6.

9. Criminal Law ⇐662.7

Violation of confrontation clause does not occur unless limitation on cross-examination could reasonably be expected to

have a substantial effect on jury's decision. U.S.C.A. Const.Amend. 6.

10. Witnesses ⇐271(1)

Trial court did not abuse its discretion in limiting defendant's cross-examination of service station clerk to preclude questioning as to exact method he used to activate surveillance camera during robbery, for purpose of authenticating photos of suspect, since testimony as to how camera was activated could not reasonably be expected to have had a substantial effect on jury's decision in light of clerk's testimony that photographs depicted man who robbed the station in the act, his personal identification of defendant as the man in photo, and foundational testimony authenticating the photographs. U.S.C.A. Const.Amend. 6.

Edward Brass, Salt Lake City, for defendant and appellant.

David L. Wilkinson, Atty. Gen., J. Stephen Mikita, Salt Lake City, for plaintiff and respondent.

HALL, Chief Justice:

Defendant Gillis Hygh appeals a conviction of aggravated robbery, a first degree felony. U.C.A., 1953, § 76-6-302 (1978). Defendant alleges that the warrantless "inventory search" of his automobile after he was placed under custodial arrest was unlawful. We agree.

At about 10:00 p.m. on December 31, 1982, a man entered a service station in Salt Lake City and asked for a pack of cigarettes. As the clerk handed the customer the cigarettes, the customer pulled a .22 caliber revolver from under his coat and ordered the clerk to empty the cash register. The clerk did so, putting approximately $350 into a paper bag. As he was emptying the register, the clerk activated a surveillance camera that had been installed by the Salt Lake City Police Department the previous month. After the robber left, the clerk called the police. The police had also been alerted to the robbery by an alarm in the police dispatcher's office which went off when the surveillance camera was activated. The police arrived shortly thereafter. The film from the surveillance camera was unloaded by a detective and taken for developing. Several of the developed pictures showing the robber's face and clothing were posted at city police stations on the line-up boards.

Immediately after the robbery, the clerk identified the robber to police as a black man wearing a rust or red colored ski mask on his head but not over his face. The robber was also wearing a khaki colored coat with "furry" lining and with a rip over the left pocket. The surveillance camera pictures showed this description to be accurate.

On January 6, 1983, a Salt Lake City police officer, Officer Foster, after stopping for a traffic light in the left lane next to defendant's car, noticed an expired rejected safety inspection sticker[1] on defendant's lower left front windshield. Officer Foster also noticed that the driver resembled the individual in the photograph of the robbery suspect posted at the police station. The officer testified at the hearing to suppress the evidence taken from defendant's car that he stopped defendant's car because of the expired safety inspection sticker.[2]

After stopping defendant's car, Foster sent a second officer to the police station to get the posted photo of the robbery suspect. Foster then checked defendant's driver's license and registration. The car was registered to defendant, but defendant had no driver's license with him. A radio

1. A rejected inspection sticker is placed on a vehicle if the vehicle does not pass the annual safety inspection. The owner of the vehicle then has five days to complete repairs and bring the vehicle back to be reinspected.

2. At the pretrial suppression hearing, Officer Foster testified: "The reason I stopped him was because of the inspection sticker." At trial, Officer Foster was asked this question: "Was the particular reason that you stopped the Defendant's vehicle, did it have anything to do with any photos that you had seen earlier that day at the police station?" He replied: "That was the reason, yes."

call to the police dispatcher verified that defendant had a license, but also revealed two outstanding misdemeanor arrest warrants against defendant. Officer Foster placed defendant under arrest on the basis of those warrants, handcuffed him, and put him in the patrol car.

Foster then ascertained that defendant's passenger was not a licensed driver and called for an impound wrecker to tow the car away.

After the second officer returned with the photo, Officer Foster conducted a search of defendant's car with the photo in his hand.[3] He did not use an inventory sheet and did not make a list of the items found in the car.[4] In the trunk, the officer found several jackets, a cap, several shirts, and a ski mask lying over the spare tire. The officer also found an unzipped plastic gym bag. The officer looked inside the bag and found a .22 caliber revolver. The gas station clerk later identified the ski mask, one of the jackets, and the gun as those used by the robber. The clerk also identified defendant as the robber. After the search of the car, Officer Foster transported defendant to the police station. Officer Foster informed the robbery detective that he believed defendant was the robber of the service station. The detective questioned defendant, then ordered Officer Foster to place defendant under arrest for aggravated robbery.

At a pretrial suppression hearing, defendant asked to have the clothing items and the revolver taken from the car suppressed as being the result of a pretextual, warrantless search. The motion was denied by the trial court on the basis that the search was a proper inventory search. At a trial before a jury, defendant was convicted of aggravated robbery. Defendant appeals, seeking a reversal of that conviction and a new trial.

[1] Article I, section 14 of the Utah State Constitution, and the fourth amendment to the United States Constitution prohibit unreasonable searches and seizures. In order for a search to be constitutionally permissible, a search warrant issued by a neutral magistrate and based upon probable cause is required. There are, however, several exceptions to the warrant requirement. These include a limited search incident to a lawful arrest;[5] search of an automobile based on probable cause that it contains contraband,[6] and seizure of evidence in plain view by one with a lawful right to be in a position to so observe it.[7]

[2] It is also well established that an inventory search constitutes an exception to the warrant requirement.[8] A warrantless search of an impounded vehicle for the purposes of protecting the police and public from danger, avoiding police liability for lost or stolen property, and protecting the owner's property is permitted by the fourth amendment and article I, section 14 of the Utah State Constitution.[9]

[3, 4] Because inventories promote such important interests and are not investigatory in purpose, they do not implicate "the interests which are protected when searches are conditioned on warrants."[10] Therefore, inventory searches are not per se unreasonable within the meaning of the fourth amendment and article I, section 14

3. The record indicates that Foster searched only the trunk of the vehicle.

4. At the pretrial suppression hearing, Foster was asked: "When you impound a car, Officer, do you use an inventory sheet of some kind?" He replied: "No, I don't. Personally I don't."

5. *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969).

6. *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970).

7. *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).

8. *South Dakota v. Opperman*, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976), *State v. Cole*, Utah, 674 P.2d 119, 126 (1983).

9. *Opperman*, *supra* note 8; *State v. Romero*, Utah, 624 P.2d 699 (1981); *State v. Crabtree*, Utah, 618 P.2d 484, 485 (1980).

10. *Opperman*, 428 U.S. at 382-83, 96 S.Ct. at 3103-04, 49 L.Ed.2d 1000 (Powell, J., concurring).

Contraband or other evidence of crime discovered in a true inventory search may be seized without a warrant and introduced into evidence at trial.[11] However, the inventory exception does not apply when the inventory is merely "a pretext concealing an investigatory police motive."[12] Fundamental constitutional guarantees against unreasonable searches cannot be evaded by labeling them "inventory" searches.

[5] In order to support a finding that a valid inventory search has taken place, the court must first determine whether there was reasonable and proper justification for the impoundment of the vehicle.[13] This justification, and thus lawful impoundment, can be had either through explicit statutory authorization or by the circumstances surrounding the initial stop.[14] If impoundment was neither authorized nor necessary, the search was unreasonable.[15]

Utah's statutes give a police department authority to impound vehicles in several situations. Vehicles may lawfully be impounded when they are used to transport controlled substances, U.C.A., 1953, § 58-37-13; when the vehicle is improperly registered or stolen, U.C.A., 1953, § 41-1-115; or when a vehicle is abandoned, U.C.A., 1953, § 41-6-116.10. No specific statutory authority exists authorizing impound of a vehicle stopped and parked on the street after the driver has been arrested. Therefore, we must look to the circumstances surrounding the stop to determine whether the impound was reasonable.

[6, 7] It is the burden of the State to establish the necessity for the taking and the inventory of the vehicle.[16] In Salt Lake City, the police department has standards set forth in a procedural order[17] whose purpose is to implement a procedure for the handling of impounds and the use of wreckers. Under this order, city police officers are directed to impound a motor vehicle of an arrested person. However, the vehicle may be released at the scene to a party designated by the owner rather than be impounded. A release form is provided to the officers to be signed by the person arrested designating an individual to take charge of the vehicle and releasing the department and its officers from all liability.

Officer Foster testified that he did ascertain that defendant's passenger was not a licensed driver. However, defendant was given no opportunity to arrange for disposition of his own car. The officer neither asked defendant whether there was someone who could come and get the car nor asked the passenger whether she could take possession of the contents of the car or get someone to come and get the car.

11. *See, e.g., Harris v. United States*, 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968); *Reece v. Commonwealth*, 220 Va. 1035, 1039, 265 S.E.2d 746, 749 (1980).

12. *Opperman*, 428 U.S. at 376, 96 S.Ct. at 3100.

13. *State v. McDaniel*, 156 N.J.Super. 347, 354-55, 383 A.2d 1174, 1177 (1978). *See also* Annot., Lawfulness of "Inventory Search" of Motor Vehicle Impounded by Police, 45 A.L.R.3d 537, 544 (1973):

> Another essential prerequisite to a valid inventory search is that the police must have taken lawful custody of the vehicle in the first instance. It has therefore been held that where the circumstances show that the police had no authority to impound the vehicle, or that police custodial care of the vehicle was not necessary, the inventory search was unlawful.
>
> [L]awful custody of an impounded vehicle does not of itself dispense with the constitutional requirement of reasonableness in regard to searches thereafter made of such vehicle.

14. *See, e.g., Opperman*, 428 U.S. at 375-76, 96 S.Ct. at 3100; *Cooper v. California*, 386 U.S. 58, 61-62, 87 S.Ct. 788, 790-91, 17 L.Ed.2d 730 (1967); *McDaniel*, 156 N.J.Super. at 355, 383 A.2d at 1177; *State v. Montague*, 73 Wash.2d 381, 385, 438 P.2d 571, 574 (1968).

15. *See State v. Goodrich*, Minn., 256 N.W.2d 506, 510 (1977).

16. *People v. Nagel*, 17 Cal.App.3d 492, 496-97, 95 Cal.Rptr. 129, 132 (1971). *See also McDaniel*, 156 N.J.Super. at 359, 383 A.2d at 1179.

17. Order Number 1-79, effective date March 1, 1979. This order in its entirety was introduced at trial.

The departmental order next establishes procedures affecting all impounds. In pertinent part, that order states:

> D. PROCEDURE [A]FFECTING ALL IMPOUNDS.
>
> 1. When an impound occurs with the owner present, the officer should ask the owner if anything of value is in the vehicle, make certain the owner knows what steps are being taken to safeguard such property, and proceed as follows:
>
> a. The officer and the wrecker driver should make a thorough inventory of the automobile, and fill in the impound slip completely, listing all necessary equipment on the car, in the car, and in the trunk.
>
> b. Any item lying loose in the vehicle should either be turned over to the owner or locked in the trunk. Small and/or valuable items should be placed in Evidence for Safekeeping unless retained by the owner.

Officer Foster did not ask defendant if anything of value was in the vehicle or tell defendant of the steps being taken to safeguard his property. While all this was taking place, defendant was handcuffed and in Foster's patrol car. Foster thus did not give defendant any opportunity to arrange for disposition of his own property. Further, the vehicle was parked next to the curb in a lawful parking area; no valuables were visible, and defendant had not indicated any were extant; a passenger was available to remove any valuables for safekeeping at defendant's request and to arrange for a third party to remove the vehicle; the car could have been locked and left unattended; and no evidence was presented to indicate that there was a danger to police or public.[18] In this case, the State has not met its burden of showing the necessity for the seizure of the vehicle.

We are not prepared to say that a true inventory search cannot be made in the presence of the vehicle's owner and without his consent. However, if the purpose of the search is truly only to inventory the contents of the vehicle and to safeguard them during impoundment, an indicia that such is the real purpose of the search is to consult with the owner of the vehicle when he is present at the time of the impound and the search.[19]

However, even if it could be determined that the impoundment itself was reasonably necessary, the search of the vehicle trunk was nevertheless not a valid inventory search. As one commentator concluded after reviewing *Opperman:*

> What is needed in the vehicle inventory context, then ... is not probable cause but rather a regularized set of procedures which adequately guard against arbitrariness.
>
> ....
>
> Inventories should not be upheld under *Opperman* unless the government shows that there exists an established reasonable procedure for safeguarding impounded vehicles and their contents and that the challenged police activity was essentially in conformance with that procedure. This means that a purported inventory should be held unlawful when it is not shown, "for [instance], that standard inventory forms were completed and kept for future reference (showing presence or absence of valuables), nor that a place of safekeeping for valuables so secured was maintained."[20]

The Salt Lake City Police Department does have a regularized set of procedures which are generally drafted to guard

18. *See generally* Annot., Lawfulness of "Inventory Search" of Motor Vehicle Impounded by Police, 48 A.L.R.3d 537 (1973).

19. *State v. Jewell*, La., 335 So.2d 633, 639 (1976). *Cf. Cole*, *supra* note 8 (after lawful impoundment of vehicle pursuant to U.C.A., 1953, § 41-1-115, officers allowed defendant to remove any items from vehicle he wished to)

20. 2 LaFave, Search & Seizure § 7.4, at 576–77 (1978) (footnotes omitted) (quoting *State v. Jewell*, *supra* note 19). *See also People v. Long*, 419 Mich. 636, 359 N.W.2d 194 (1984) (inventory search held invalid because of lack of standard police procedures for conducting inventory searches).

against arbitrariness by an officer in the field. However, Officer Foster did not follow these procedures. He did not involve the owner of the vehicle, who was present, in his decision. More importantly, the record indicates that he did not completely search the vehicle and did not make any kind of a list of the items in the automobile, much less use a standard inventory form. Without this, the search cannot be fairly characterized as an inventory search. In addition, Officer Foster sent another officer to the police station to retrieve the picture of the robbery suspect even before asking defendant for his license and registration, waited for the picture before beginning the search, and searched with the picture in his hand. These facts indicate that the "inventory" search was merely a pretext for a warrantless search. Under these circumstances, the evidence discovered in defendant's trunk should have been suppressed as the result of an improper, warrantless search. Defendant's conviction is thus reversed and the case remanded for a new trial.

Defendant's second point on appeal is that the trial court denied defendant his constitutional right to be confronted with the witnesses against him because defendant's counsel was not allowed to cross-examine the State's witnesses specifically regarding how the surveillance camera was activated. Defendant argued he wished to present the defense of whether, in fact, the camera was activated at the time of the robbery or could have been activated at some earlier time. The State objected to cross-examination concerning the precise method of activation, arguing that the need to maintain secrecy outweighed any need defendant might have for the information. The trial judge refused to allow cross-examination on that aspect on the ground that it was not relevant given the scope of direct examination.

At trial, the State offered as evidence photographs developed from the film taken from the surveillance camera on the night of the robbery. The gas station clerk testified that he had been instructed how to activate the camera. During the robbery, he did so while emptying the cash register of the money. The clerk further testified that he knew the camera was operating because of motor sounds and soft clicks coming from the camera. The police detective who had installed the crime-eye camera at the gas station testified that the camera was operating properly. He further testified that if the camera was activated, an alarm went off at the police dispatch office. Since installation, the camera had been activated and the alarm had gone off only twice: once on November 6 and once on December 31. The first time, on November 6, the detective had returned to the gas station, reloaded the camera, and reset it. Prior to resetting the camera, the detective made several exposures of his own face on the first few frames of the film to ensure that the camera was operating properly. The contact print of the film taken from the camera on the night of December 31 shows the face of the detective in the first few frames, then the photos identified as those of defendant. Additional testimony was adduced from several officers which established the chain of custody of the film and subsequently developed photographs. The trial judge admitted the photographs.

There are two basic theories upon which photographic evidence is admitted: the "silent witness" theory and the "pictorial testimony" theory.[21] Under the first theory, properly authenticated photographs are "silent witnesses" that speak for themselves and constitute independent, substantive evidence of what they portray, independent of a sponsoring witness.[22] Under the "pictorial testimony" theory, the photographic evidence is illustrative of a witness's testimony and only becomes admissible when a

21. *Fisher v. State*, 7 Ark.App. 1, 5–6, 643 S.W.2d 571, 573–74 (1982). *State v. Henderson*, 100 N.M. 260, 261–62, 669 P.2d 736, 737–38 (1983). *See also* 2 C. Scott, Photographic Evidence § 1121.2d ed. Supp. 1984). 3 J. Wigmore, Evidence § 790 (Chadbourn rev. 1970).

22. *Id. See also United States v. Gaskin*, [illegible] F.Supp. 423 (W.D.Pa.1975).

sponsoring witness can testify that it is a fair and accurate representation of the subject matter based on that witness's personal observation.[23]

The photos introduced at trial were introduced under the second theory. The clerk was shown two photographs taken by the surveillance camera and asked if each constituted a fair and accurate representation of the individual who committed the robbery, both the person and the clothes he was wearing. The clerk replied that those photos were the robber in the act of robbing the station. Thus, the photos were authenticated by the testimony of a witness with knowledge that the photos were what they claimed to be:[24] photos of defendant robbing the gas station.[25]

[8] The right to confrontation includes the right to cross-examine witnesses.[26] However, this right is not absolute. The trial court has discretion in limiting the scope and extent of cross-examination.[27] Absent an abuse of that discretion, this Court will not disturb the ruling.

Defendant's counsel had ample opportunity to cross-examine the gas station clerk concerning the accuracy of his memory of the individual robber and clothes, whether in fact the clerk did activate the camera, and how he knew it was activated. Defendant took full advantage of that opportunity. Defendant also had the opportunity to cross-examine the police detective and officers who testified concerning the surveillance camera. The only question defendant was not allowed to ask was how specifically the camera was activated.

[9, 10] A violation of the confrontation clause does not occur unless the limitation *on the cross-examination could reasonably* be expected to have a substantial effect on the jury's decision.[28] Testimony as to how the camera was activated could not reasonably be expected to have had a substantial effect on the jury's decision in the face of the clerk's testimony that the photographs depicted the man who robbed the station in the act, the clerk's personal identification of defendant as the man in the photo, and the foundational testimony authenticating the photographs. Under these circumstances, the trial court did not abuse its discretion.

Defendant's conviction is reversed and the case remanded for a new trial in accordance with this opinion.

STEWART and HOWE, JJ., concur.

ZIMMERMAN, Justice: (Concurring Separately).

I join in the Court's reversal of the conviction of defendant Hygh. The impoundment and search of defendant's automobile violated his right to be free from unreasonable searches and seizures, as guaranteed by the fourth amendment to the United States Constitution and by article I, section 14 of the Utah Constitution. However, I cannot agree with two assumptions implicit in the majority opinion: first, that the scope of the warrant requirement under article I, section 14 is congruent with that developed by the federal courts under the fourth amendment; second, that the remedy for a violation of Utah's search and seizure provision is the same as the remedy for a violation of the federal provision—exclusion of the evidence seized.

The federal law regarding warrantless searches and seizures has become a laby-

23. *Supra* note 21.

24. *See United States v. McNair*, 439 F.Supp. 103, 105 (E.D.Pa.1977), *Fisher*, 7 Ark.App. at 6, 643 S.W.2d at 574; *People v. Perry*, 63 Cal.App.3d 608, 131 Cal.Rptr. 429 (1976).

25. The photographs were not purported to be introduced under the "silent witness" theory. Therefore, we do not decide whether our resolution of this point would differ had the State done so.

26. *Davis v. Alaska*, 415 U.S. 308, 316–17, 94 S.Ct. 1105, 1110–11, 39 L.Ed.2d 347 (1974).

27. *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S.Ct. 1038, 1045–46, 35 L.Ed.2d 297 (1973).

28. *United States v. Farnsworth*, 729 F.2d 1158, 1162 (8th Cir.1984), *Hughes v. Raines*, 641 F.2d 792, 792 (9th Cir.1981).

rinth of rules built upon a series of contradictory and confusing rationalizations and distinctions. Police officers and judges attempting to make their way through this labyrinth often imperil both the rights of individuals and the integrity and effectiveness of law enforcement. *See, e.g.*, Wermiel, *Recent Rulings Leave Police More Confused About What's Legal*, Wall St.J., August 9, 1985, at 1, col. 1. In many cases, the exclusionary rule, adopted by the federal courts as the sole remedy for fourth amendment violations, appears to have influenced, if not controlled, the scope of the constitutional right it was designed to further. Many of the arcane rules developed to justify warrantless searches seem to have been fashioned solely to avoid the consequences of the exclusionary rule.

Sound arguments may be made in favor of positions at variance with the current federal law respecting both the scope of the individual's right to be free from warrantless searches and seizures and the remedy for any violation of that right. Acceptance by this Court of such arguments under the Utah Constitution's search and seizure provision might result in simpler rules that can be more easily followed by police officers and the courts. At the same time, these rules might provide the public with greater and more consistent protection against unreasonable searches and seizures by eliminating many of the confusing exceptions to the warrant requirement that have been developed in recent years.[1]

One way to improve predictability might be to sharply limit the sweep of exceptions to the warrant requirement that often raise questions of police overreaching. In their place, clear-cut rules could be adopted—for example, a flat requirement that a warrant must be obtained before *any* nonconsensual search of property not in the immediate physical control of a suspect is conducted.[2] Such a rule would be an improvement over present law, both for the individual and for the police. The individual would be assured that, in most cases, his property would not be searched or seized unless the reasons for the search or seizure have first been presented to a neutral magistrate and a warrant issued. At the same time, police officers would not be forced to speculate about what may or may not be subject to search without a warrant. Warrantless searches would be permitted only where they satisfy their traditional justification to protect the safety of officers or to prevent the destruction of evidence. *See, e.g.*, *Chimel v. California*, 395 U.S. 752, 762–63, 89 S.Ct. 2034, 2039–40, 23 L.Ed.2d 685 (1969). Once the threat that the suspect will injure the officers with concealed weapons or will destroy evidence is gone, there is no persuasive reason why the officers cannot take the time to secure a warrant.

Such a requirement would present little impediment to police investigations, especially in light of the ease with which warrants can be obtained under Utah's telephonic warrant statute, U.C.A., 1953, § 77-23-4(2) (1982 ed.). *See State v. Lopez*, Utah, 676 P.2d 393 (1984). Perhaps most importantly, such a rule could be readily

1. Recently, the United States Supreme Court has attempted to provide police with relatively clear standards for warrantless automobile searches by sweeping away many of the subtle and inconsistent rules that governed this area. In *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982), the Court held that if police officers lawfully stop a vehicle, they may conduct a warrantless search of all compartments and containers within the vehicle if they have probable cause to believe that contraband is concealed somewhere in the car. In my view, this belated attempt to bring consistency and coherence to automobile searches fails because it essentially gets the fourth amendment's warrant requirement as it pertains to automobile searches. *See* 456 U.S. at 827, 102 S.Ct. at 2174 (Marshall, J., dissenting). There is little reason to believe that effective law enforcement requires this sacrifice of the interests protected by the warrant requirement. *See, e.g., The Supreme Court—1981 Term*, 96 Harv.L.Rev. 176, 184–85 (1982).

2. "Immediate physical control" refers to an area within which a suspect could reasonably be expected to grab a weapon or destroy evidence during an encounter with police officers. The exception would be limited by its justification and would not generally permit warrantless searches of car trunks, for example, or containers beyond the suspect's reach.

understood and complied with by police officers, and evidence uncovered in compliance with it would more than satisfy the requirements of the fourth amendment to the federal constitution.

Sound arguments can also be made against acceptance of the federal version of the exclusionary rule as the sole remedy for unlawful searches and seizures. *See generally* Coe, *The A.L.I Substantiality Test: A Flexible Approach to the Exclusionary Sanction*, 10 Ga.L.Rev. 1 (1975); Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule*, 69 Geo.L.J. 1361 (1981). Although this Court has tacitly followed the federal lead on this matter, I have found no case in which this Court has decided to adopt the exclusionary rule after independently analyzing the question of what remedy is available for an unlawful search or seizure under our state constitution. Perforce, this Court has never considered the appropriateness of possible exceptions to the exclusionary rule or the availability of alternative or supplemental remedies, such as the imposition of civil liability on police officers.

I do not suggest that without further consideration this Court should either adopt the hypothetical warrantless search and seizure rule discussed above or reject the exclusionary rule as a remedy for violations of article I, section 14. I only contend that such arguments should not be foreclosed from consideration by our unanalyzed acceptance of the federal position. The federal law as it currently exists is certainly not the only permissible interpretation of the search and seizure protections contained in the Utah Constitution.[3] If, after consideration, we conclude that we can strike a balance between the competing interests involved so as to better serve them all, then we should not hesitate to do so. *See generally* Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 Ga.L.Rev. 165 (1984); *see also Massachusetts v. Upton*, 104 S.Ct. 2085, 2089–91 (1984) (Stevens, J., concurring).

DURHAM, J., concurs in the concurring opinion of ZIMMERMAN, J.

MUNICIPAL BUILDING AUTHORITY OF IRON COUNTY, Utah, a Utah nonprofit corporation, and Iron County, a body corporate and politic, Plaintiffs and Respondents,

v.

Dennis LOWDER, individually and as county auditor of Iron County; and Clair Hulet, individually and as county clerk of Iron County, Defendants and Appellants.

No. 19959.

Supreme Court of Utah.

Nov. 27, 1985.

County and its municipal building authority, brought action against county officials, seeking declaratory relief and writ of mandamus to compel county officials to carry out their alleged duties in connection with county's plan for financing construction of new jail facility. The District Court, Iron County, George E. Ballif, J., upheld actions of county, and the county officials appealed. The Supreme Court, Zimmerman, J., held that: (1) debt of municipal housing authority for which county was not responsible was not subject to debt

3. Developing a jurisprudence of state constitutional law is not a novel idea. For example, the state of Washington has interpreted its constitutional search and seizure provisions differently than the United States Supreme Court has interpreted the fourth amendment. *See* Note, *Seizing Opportunity, Searching for Theory: Article I, Section 7*, 8 U. Puget Sound L.Rev. 331 (1985). The state of Alaska has also construed its search and seizure provision to provide broader protection. *Beccera v. State*, Alaska, 599 P.2d 727, 734 (1979).

challenge. Second, the damage done by wrongly deciding this case and encouraging more ex-spouses to bring on baseless attempts to change custody far outweighs any harm to the Shioji children that would attend a reversal. We cannot let the fact that these proceedings have dragged on dictate the law we enunciate or the result we reach. Custody of the children should be returned to appellant.

DURHAM, Justice, concurs in the dissenting opinion of Justice ZIMMERMAN.

The STATE of Utah, Plaintiff and Respondent,

v.

Ross GALLEGOS, Defendant and Appellant.

No. 20319.

Supreme Court of Utah.

Nov. 29, 1985.

Defendant was convicted in the Utah District Court, J. Robert Bullock, J., of theft by receiving, and he appealed. The Supreme Court, Hall, C.J., held that (1) Fourth Amendment requirement that items to be seized be particularly described in search warrant was abridged and (2) police did not enter defendant's home based upon search warrant and while there initiate and conclude independent outside investigation to achieve probable cause to seize unnamed property.

Order denying motion to suppress reversed and case remanded.

1. Searches and Seizures ⇐7(5)

Search of constitutionally protected area pursuant to valid search warrant, and seizures pursuant thereto, are prima facie reasonable.

2. Searches and Seizures ⇐3.5, 3.7

Decision to seize must be judicial, as opposed to administrative, and search warrant must be sufficiently particular to guide officer to thing intended to be seized, thereby minimizing danger of unwarranted invasion of privacy.

3. Searches and Seizures ⇐3.7

Line between what is and what is not sufficiently particular in search warrant must be drawn with a view to accomplishment of constitutional purpose of minimizing danger of unwarranted invasion of privacy and necessarily varies with circumstances and with nature of property to be seized.

4. Searches and Seizures ⇐3.7

Without substantial justification, search warrants describing property only in generic terms are not favored by the law.

5. Searches and Seizures ⇐7(8)

Fourth Amendment requirement that items to be seized be particularly described in search warrant was abridged by warrant which required seizure of all "stolen property." U.S.C.A. Const. Amend. 4

6. Searches and Seizures ⇐3.8(2)

Assuming that affidavit by police officer was properly incorporated into search warrant, and thus, validated general description provided in warrant, seized VCR and tapes was still not within scope of warrant since affidavit listed only such things as lawn chairs, electrical wiring, and children's swing as "stolen property."

7. Searches and Seizures ⇐3.8(2)

When, in course of performing lawful search for items listed on warrant, officers come across other articles of incriminatory nature, that property may be properly seized under p[illegible]

8. Searches and Seizures ⇐3.3(4)

Warrantless seizure of property in plain view after lawful intrusion is justified

ADDENDUM #4

if officer is lawfully present where search and seizure occur, evidence is in plain view, and evidence is clearly incriminating

9. Searches and Seizures ⇐3 8(1)

Police could not enter home based upon search warrant and while there initiate and conclude independent outside investigation to obtain probable cause to seize unnamed property, particularly where there was nothing about the nature or physical character of property seized that rendered it inherently identifiable as being stolen.

Randall Gaither, Salt Lake City, for defendant and appellant.

David L Wilkinson, Atty Gen., Sandra L Sjogren, Salt Lake City, for plaintiff and respondent

HALL, Chief Justice

A jury found the defendant Ross Gallegos, guilty of the crime of theft by receiving,[1] a third degree felony On appeal, the defendant seeks a reversal of the trial court order denying his motion to suppress evidence and for a new trial

I.

On July 17, 1984, Provo City police officers went to Gallegos' home in Provo to execute a search warrant The warrant ordered seizure of "all controlled substances and stolen property " An affidavit in support of issuance of the warrant stated that an "informant did see within the last 48 hours at least one pound of marijuana and several items proported [sic] by Gallegos to be stolen (lawn chairs electrical wiring, children's swing, etc)" at Gallegos' home

While searching the home, Officer Craig Geshison noticed a Magnavox VCR, attached to a television set, and two video tapes close by He asked Gallegos about them and Gallegos remarked that he had rented them from Norton's supermarket. Geshison called the police dispatcher and asked her to verify this information with Norton's. Norton's assistant manager advised the dispatcher that Norton's had not rented the VCR based on the fact that there was no rental contract on file under the name of Gallegos or Gallegos' girl friend This inquiry took from ten to fifteen minutes After receiving this information, Geshison examined the VCR and discovered that the serial number was missing When the defendant and his girlfriend were unable to produce a rental receipt for the VCR, Geshison seized the VCR and the tapes A review of the record indicates that none of the property indicated as being stolen in the affidavit was seized by the officers

The following day, Geshison called several stores in the Provo area, trying to determine if the VCR was in fact stolen Eventually ownership of the VCR and tapes was traced to Sounds Easy, an audio-video store which reported them stolen from a customer's truck

Prior to trial, the defendant made a motion to suppress evidence of the discovery of the VCR and the tapes in him home on the grounds that the seizure exceeded the scope of the warrant and that the plain view doctrine was not applicable The trial judge seems to have agreed but denied the motion based on the State's argument The prosecutor argued that Officer Geshison, while lawfully in the defendant's home, initiated an independent investigation which provided the officer with probable cause to seize the VCR and [illegible] The prosecutor made the same argument during the defendant's trial, and the defendant was found guilty of theft by receiving

II

At the outset, it is important to note that this Court will not disturb the ruling of the trial court on questions of admissibility of evidence unless it clearly appears that the

1. U C A 1953 § 76-6-408 (Supp 1985)

lower court was in error.[2] Accordingly, this Court may affirm the trial court's decision to admit evidence on any proper grounds, even though the trial court assigned another reason for its ruling.[3] Therefore, we must address whether the VCR was seized within the scope of the warrant and, if not, whether its seizure was justified by an exception to the fourth amendment's warrant requirement.

[1] The fourth amendment protects people from unreasonable searches and seizures of their person, home, papers, and effects. The amendment's proscriptions apply with equal force to the states.[5] A search of a constitutionally protected area, as was the case here,[6] pursuant to a valid search warrant, and seizures pursuant thereto, are prima facie reasonable.

At the hearing on the motion to suppress, the defendant appears to have conceded that since the officers entered the premises pursuant to a search warrant there was a valid entry and search.[7] Therefore, the only issue in this case is whether the seizure of the tapes and the VCR was justified under the fourth amendment.

[2, 3] The State first argues that the property seized was within the scope of the warrant. The fourth amendment to the United States Constitution requires that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the ... things to be seized." This portion of the amendment is essentially a proscription against general warrants whereby administrative officers determine what is and what is not to be seized. The decision to seize must be judicial, as opposed to administrative, and the warrant must be sufficiently particular to guide the officer to the thing intended to be seized, thereby minimizing the danger of unwarranted invasion of privacy.[8] Accordingly, the line between what is and what is not sufficiently particular must be drawn with a view to accomplishment of the constitutional purpose[9] and necessarily varies with the circumstances and with the nature of the property to be seized.[10]

[4, 5] In this case, the warrant ordered seizure of "all controlled substances and stolen property." Without substantial justification, warrants describing property only in generic terms (terms applicable to an entire class of property) are not favored by the law.[11] However, use of such descriptions has been allowed when a more specific description of the things to be seized is unavailable. Thus, general descriptions have been held sufficient

> [i]n cases involving contraband, such as drugs.... [i]n cases where the inherent nature of the property sought by a warrant precludes specific description.... [in cases] where attendant circumstances prevented a detailed description from being given.... and [in cases where a] detailed description has been difficult and the evidence established that the sto-

2. *State v. Cole*, Utah, 674 P.2d 119, 122 (1983).

3. *See State v. Bryan*, Utah, 709 P.2d 257, 260 (1985).

4. *See* U.S. Const. amend IV.

5. *State v. Kent*, 20 Utah 2d 1, 5, 432 P.2d 64, 66 (1967).

6. *See Katz v. United States*, 389 U.S. 347, 351 n. 8, 356, 88 S.Ct. 507, 511 n. 8, 514, 19 L.Ed.2d 576 (1967); *State v. Folkes*, Utah, 565 P.2d 1125, 1127, *cert. denied*, 434 U.S. 971, 98 S.Ct. 523, 54 L.Ed.2d 461 (1977).

7. Because of counsel's concession we need not address the good faith exception to the exclu-

sionary rule. *See Massachusetts v. Sheppard*, — U.S. —, 104 S.Ct. 3424, 82 L.Ed.2d 737 (1984).

8. *State v. Tidyman*, 30 Or.App. 537, 568 P.2d 666, 670 (1977) (*citing Marron v. United States*, 275 U.S. 192, 196, 48 S.Ct. 74, 76, 72 L.Ed. 231 (1927)).

9. *See, e.g., United States v. Cook*, 657 F.2d 730, 733 (5th Cir.1981).

10. *See People v. Harmon*, 90 Ill.App.3d 753, 755, 46 Ill.Dec. 27, 29, 413 N.E.2d 467, 469 (1980). *See also State v. Townsend*, 394 F.Supp. 736, 746-47 (E.D.Mich.1975).

11. *See Cook*, 657 F.2d at 733.

len goods sought are likely to be part of a larger collection of similar contraband located at the premises to be searched.[12]

Since none of these recognized exceptions apply to the portion of the order requiring seizure of all "stolen property," it is obvious that the fourth amendment requirement that items to be seized be particularly described was abridged in this case.[13]

[6] It has been held that a general description on the face of a warrant may be cured by *proper* incorporation of a sufficiently descriptive supporting affidavit.[14] Assuming, without deciding, that the affidavit by Officer Eagan was properly incorporated and thus validated the general description on the warrant, the seizure of the VCR and the tapes was still not within the scope of the warrant; the affidavit lists only "lawn chairs, electrical wiring, children's swing, etc." as being stolen property.

III.

[7] The State alternatively argues that the tapes and the VCR were properly seized pursuant to the plain view doctrine. Ordinarily, only items described in a search warrant may be seized.[15] However, when, in the course of performing a lawful search for items listed on a warrant, officers come across other articles of an incriminatory nature, that property may be properly seized under the plain view doctrine.

The plain view doctrine is grounded upon the proposition that when an object is in plain view there is no fourth amendment search. Accordingly, in actuality the doctrine merely provides grounds for seizure of an item when access to an object is properly justified under the fourth amendment. The owner's only remaining interests are those of possession and ownership.[16]

[8] Because this Court is sensitive to the inherent danger that officers will use the plain view doctrine to enlarge specific authorization to seize into a general warrant to rummage, we have previously adopted a modified version of the guidelines laid down in *Coolidge v. New Hampshire*.[17] Thus, a warrantless seizure of property in plain view after a lawful intrusion is justified if: "(1) the officer is lawfully present where the search and seizure occur, (2) the evidence is in plain view, and (3) the evidence is clearly incriminating."[18] There is no question that the VCR and tapes were in plain view and, as noted above, the defendant conceded that the officers were lawfully present. The defendant, however, argues that the incriminatory nature of the property was not "immediately apparent." This language from *Coolidge* is in substance contained in the third requirement noted above that the evidence be "clearly incriminating." The clearly incriminating requirement also mandates that officers have probable cause to associate the property to be seized with criminal activity.

[9] The scope of this requirement must be determined by balancing the intrusion on fourth amendment interests against the promotion of legitimate governmental in-

12. *Namen v. State*, Alaska App., 665 P.2d 557, 561-62 (1983) (footnotes omitted).

13. *See Namen*, 665 P.2d at 562-63; *Kinsey v. State*, Okl.Crim., 602 P.2d 240, 242 (1979); 2 W. La Fave, Search and Seizure § 4.6(c), at 102 (1978). *See also Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 99 S.Ct. 2319, 60 L.Ed.2d 920 (1979).

14. *See* 2 W. La Fave, Search and Seizure § 4.6(a), at 100 n. 23 (1978 & Supp.1985).

15. *See State v. Griffin*, Utah, 626 P.2d 475, 482 (1981) (Wilkins, J., concurring).

16. *See State v. Romero*, 660 P.2d 715, 718 (1983).

17. *See State v. Martinez*, 23 Utah 2d 62, 65, 457 P.2d 613, 615 n. 5 (1969).

18. *See Texas v. Brown*, 460 U.S. 730, 739, 103 S.Ct. 1535, 1541, 75 L.Ed.2d 502 (1983).

19. 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).

20. *State v. Romero*, Utah, 660 P.2d at 718 (footnote omitted).

terests.[21] The State of course has a valid interest in gathering and seizing evidence of criminal activity in order to suppress the lawless element of our society. However, the public has the right to be free from unreasonable seizures by the State. Although this Court does not interpret the "clearly incriminating" requirement as requiring that evidence be "clearly incriminating" at first glance,[22] to allow police to conduct an off-premises investigation to establish probable cause to seize property not designated in the search warrant is clearly unacceptable under the fourth amendment.

Here, Officer Geslison testified that at the time he first saw the VCR he had no information that the video recorder had been stolen. The record indicates that Officer Geslison only had reasonable suspicion to believe that the recorder was stolen after having a dispatcher follow up the defendant's claim that he rented the machine from Norton's. At trial, Officer Mock testified that the inquiry through the police dispatcher took from ten to fifteen minutes. Officer Geslison's subsequent discovery of the missing identification number and discovery the next day that the property was in fact stolen, did not dissipate the original [illegible] Affirmance of this type of police investigation would have the proscribed effect of allowing police to search under a general warrant.

Police cannot enter a person's home based upon a search warrant and while there initiate and conclude an independent outside investigation to achieve probable cause to seize unnamed property. This is particularly true in a case such as this when nothing about the nature or physical character of the property seized rendered it inherently identifiable as being stolen.

[illegible] the defendant's motion to suppress the evidence seized is reversed and the case is remanded for a new trial.

STEWART, HOWE, DURHAM and ZIMMERMAN, JJ., concur.

21. *Delaware v. Prouse*, 440 U.S. 648, 654, 99 S.Ct. 1391, 1396, 59 L.Ed.2d 660 (1979).

22. *See Texas v. Brown*, 460 U.S. at 741, 103 S.Ct. at 1542.

STATE of Utah, Plaintiff and Respondent,

v.

Paul Leo KNOLL, Defendant and Appellant.

No. 18857.

Supreme Court of Utah.

Dec. 3, 1985.

Defendant was convicted in the Third District Court, Salt Lake County, Bryant C. Croft, J., of manslaughter, and he appealed. The Supreme Court, Stewart, J., held that: (1) self-defense instruction was proper, and (2) evidence was sufficient to support finding that defendant had not acted in self-defense.

Affirmed.

1. Homicide ⇐7

Absence of self-defense is not one of the prima facie elements of homicide. U.C.A.1953, 76-2-401, 76-2-402, 76-5-201, 76-5-205.

2. Homicide ⇐211(3)

Although self-defense is a defense in homicide prosecution, procedural rules that govern its pleading and proof are largely influenced by constitutional requirements that State must prove criminal act beyond a reasonable doubt. U.C.A.1953, 76-2-402.

3. Homicide ⇐244(3)

Defendant is not required to establish defense of self-defense beyond a reasonable doubt, or even by preponderance of the evidence; thus, jury may acquit even though evidence of self-defense fell far short of establishing justification or excuse by a preponderance of the evidence upon the subject. U.C.A.1953, 76-2-402.

[5] Even if her constitutional rights were not violated, Brisebois contends that she was prejudiced by the mid-trial amendment. CrR 2.1(d) states:

> The court may permit any information to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced.

The defendant bears the burden of showing prejudice. *State v. Jones*, 26 Wash.App. 1, 6, 612 P.2d 404 (1980); *State v. Eaton*, 24 Wash.App. 143, 600 P.2d 632 (1979).

[6, 7] In evaluating prejudice, the court must determine if the defendant was misled or surprised. *State v. Brown*, 74 Wash.2d 799, 801, 447 P.2d 82 (1968). Here, the trial court determined that neither was the case. The State provided Brisebois with discovery outlining the State's witnesses' testimony. Much of this material involved Brisebois' actions prior to September 1979. The amended information did not require Brisebois to defend against any additional allegations. Nor was Brisebois required to rebut additional testimony. The trial court ruled correctly.

Finally, Brisebois argues that the statute of limitations barred prosecution for all conduct occurring before November 1979. The statute of limitations for theft is 3 years. RCW 9A.04.080. Brisebois argues that if the State was properly limited to proving those acts that fell within the statute of limitations period, the State would not be able to prove Brisebois took more than $1,500.

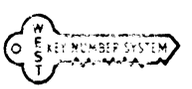
[8–10] Neither statute nor case law supports this contention. RCW 9A.56.010(12)(c) provides:

> Whenever any series of transactions which constitute theft, would, when considered separately, constitute theft in the third degree because of value, and said series of transactions are a part of a common scheme or plan, then the transactions may be aggregated in one count
>
> . . .

Whether successive takings constitute a single larceny is a question of fact for the jury. *State v. Vining*, 2 Wash.App. 802, 809, 472 P.2d 564, 53 A.L.R.3d 390 (1970). Brisebois neither argued at trial nor maintains on appeal that her crime was not continuous. "[When a] crime is continuous[,] [t]he crime is not completed until the continuing criminal impulse [is] terminated." *State v. Carrier*, 36 Wash.App. 755, 758, 677 P.2d 768 (1984). The statute of limitations does not begin to run until the crime is completed. *State v. Carrier, supra.* Here, the crime was completed in 1980, well within the 3-year statute of limitations.

The judgment and sentence is affirmed.

SCHOLFIELD and WARD WILLIAMS, JJ., concur.



39 Wash.App. 136

STATE of Washington, Respondent,

v.

Lisa L. DRESKER (Lindquist) and Richard Lindquist, Appellants.

No. 5716-III-0.

Court of Appeals of Washington, Division 3.

Dec. 11, 1984.

Defendants were convicted in the Superior Court, Grant County, James D. Kendall, J., of manufacturing controlled substance, and they appealed. The Court of Appeals, Thompson, J., held that officers' entry into defendants' residence without arrest or search warrant was unlawful and evidence obtained as result of unlawful entry should have been suppressed.

Reversed.

1. Arrest ⇐68.5(4)

In absence of consent or exigent circumstances, arrest warrant is required to

enter suspect's home to make criminal arrest. U.S.C.A. Const.Amend. 4.

2. Searches and Seizures ⇐7(29)

State has burden of establishing that consent to search was in fact freely and voluntarily given. U.S.C.A. Const.Amend. 4.

3. Searches and Seizures ⇐7(27)

Where deputy had come to defendant's residence [redacted] drinking by minors, fact that defendant entered residence, "let's step inside," was not [redacted] and [redacted] search residence. U.S.C.A. Const.Amend. 4.

4. Criminal Law ⇐1139

While findings of trial court following suppression hearing were of great significance, constitutional rights at issue in defendant's claim of illegal search and seizure required Court of Appeals to make independent evaluation of evidence.

5. Searches and Seizures ⇐3.3(1)

Mere possibility of escape is not sufficient [redacted] under fleeing suspect exigency; additional relevant factors should be considered, including gravity of offense committed, belief that suspect is armed, and likelihood that suspect would escape in absence of swift police action. U.S.C.A. Const.Amend. 4.

6. Arrest ⇐68.5(4)

In light of relatively minor violations suspected and lack of any indication that weapons were present, officers' mere belief that persons at party at which underage drinking was suspected might disperse upon arrival of police was insufficient to warrant entry of defendant's residence without warrant.

7. Arrest ⇐63.4(3)

Arrest based on suspicion or for purposes of [redacted] condoned.

8. Arrest ⇐68.5(4)

Officers had no right to enter defendant's residence at which party was occurring, where officers had no more than suspicion that underaged drinking was taking place at [redacted] RCWA 10.31.100.

Harry E. Ries, Ries & Kenison, Moses Lake, for appellants.

Paul A. Klasen, Jr., Pros. Atty., Mary Ann Brady, Deputy Pros. Atty., Ephrata, for respondent.

THOMPSON, Judge.

Richard Lindquist and Lisa Dresker Lindquist were convicted under the Uniform Controlled Substances Act, RCW 69.50, of manufacturing a controlled substance. On appeal they contend the trial court erred in refusing to suppress evidence seized at their residence. We reverse.

This case arose out of a prenuptial wedding reception held in honor of the Lindquists' forthcoming June wedding. Sergeant Cleve Schuchman of the Grant County sheriff's office received a radio message that a large party was taking place at the Lindquist mobile home located approximately a mile outside the city of Quincy. Sergeant Schuchman arrived at the Lindquist residence about 9:30 p.m. the evening of May 22, 1982, and observed 40 to 50 vehicles parked in the area. He testified he associated some of the vehicles with minors. The party was loud and he saw people wandering about the premises with beer bottles and drinking cups in their hands.

Sergeant Schuchman returned to the Quincy Police Department and organized six additional police officers for the purpose of conducting a raid. As Sergeant Schuchman testified at the suppression hearing, "I felt at that point we had probable cause to go into the residence to check to see if in fact they were drinking". In organizing the raid, the officers, anticipating that their arrival would precipitate the rapid departure of some partygoers, developed a plan of containment whereby some deputies were directed to go directly into

the Lindquist residence and others were to go directly to the garage area. Sergeant Schuchman elected to remain on the road near the residence.

The seven police officers arrived at the residence and proceeded directly to their assigned tasks. Deputy Schultz stated that as he approached the front door of the mobile home he could see through the front window what appeared to be minors in the residence with beer bottles and paper cups in their hands. At or near the front door, Deputy Schultz testified he met Richard Lindquist and the deputy stated, "let's step inside the residence." Mr. Lindquist made no reply and the deputy continued on into the home.

After entering the mobile home, the deputies segregated the people, directing the adults to remain in the mobile home and directing persons under 21 out into the garage. Some of the deputies then proceeded to write citations to the adults remaining in the dining room area while other deputies wandered about the home looking in rooms and closets for additional suspects. Some 15 to 30 minutes after their arrival, Deputy Schultz noticed a tray on top of a buffet in the dining room area. The tray contained marijuana seeds and marijuana remnants. The discovery prompted Deputy Schultz to ask Mr. Lindquist for permission to search the residence and [redacted] The deputies returned to town for a search warrant while others remained to secure the residence. A search warrant was obtained and served upon the Lindquists and a subsequent search and seizure produced additional contraband and drug paraphernalia, most of which was entered into evidence during trial. After a 2-day hearing on defendants' motion to suppress during which witnesses testified for both the prosecution and the defendants, the trial court denied the motion.

[1] The dispositive issue is whether the deputy's [redacted] of the Lindquist residence was lawful. If the entry was lawful and the officers were in a place they had a right to be, *State v. Chrisman*, 100 Wash.2d 814, 676 P.2d 419 (1984), then presumably that which they saw in plain view would support the subsequent issuance of the search warrant.[1] The police officers had neither an arrest warrant when they arrived at the Lindquist residence. In the absence of consent or exigent circumstances, a search warrant is required to enter a suspect's home to make a criminal arrest. *State v. Counts*, 99 Wash.2d 54, 58, 659 P.2d 1087 (1983), *adopting Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980); *State v. Teuber*, 19 Wash.App. 651, 577 P.2d 147 (1978) (misdemeanor arrest). The force of this rule is underlined in the *Payton* decision. That court held the Fourth Amendment

> protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their ... houses ... shall not be violated." ... the Fourth Amendment has drawn a firm line [redacted] the house. Absent exigent circumstances, that threshold [redacted]

Payton, 445 U.S. at 589-90, 100 S.Ct. at 1381-82. The pronouncement is clear.

[2, 3] The State has the burden of establishing that consent was in fact freely and [redacted] given. *State v. Counts*, *supra* 99 Wash. at 64, 659 P.2d 1087. The deputies formulated a plan while still at the Quincy police station whereby the residence would be entered in order to minimize the anticipated rapid departure of partygoers that would be precipitated by the

1. We have not addressed the propriety of the issuance of the search warrant based on Deputy Schultz' affidavit nor the scope and intensity of the subsequent search since no such issues have been raised on appeal. Our silence should not be interpreted as either approval or disapproval of the procedures.

arrival of the police. Deputy Schultz was on his way into the Lindquist residence when by happenstance he ran into Mr. Lindquist. In light of the deputies' previously planned destination, it is obvious his statement to Mr. Lindquist, "let's step inside", was not a request for permission to enter. To the contrary, it was a command to Mr. Lindquist to go back into the residence. Mr. Lindquist's silence and compliance with the command was not consent; consent was neither sought nor given.

[1-6] In *Counts*, 99 Wash. at 60, 659 P.2d 1087, the court noted five circumstances which could be termed exigent: (1) hot pursuit; (2) fleeing suspect; (3) danger to an arresting officer or to the public; (4) mobility of the vehicle; and (5) risk of destruction of the evidence. The trial court determined the State established exigent circumstances warranting entry into the residence in order to prevent mass dispersal. We disagree. While the findings of the trial court following a suppression hearing are of great significance to a reviewing court, the constitutional rights at issue require us to make an independent evaluation of the evidence. *State v. Daugherty*, 94 Wash.2d 263, 269, 616 P.2d 649 (1980); *State v. Agee*, 89 Wash.2d 416, 419, 573 P.2d 355 (1977). The mere possibility of escape is not sufficient under the fleeing suspect exigency. *State v. Coyle*, 95 Wash.2d 1, 9, 621 P.2d 1256 (1980). Additional relevant factors should be considered, including (1) the gravity of the offense committed; (2) the belief that the suspect is armed; and (3) the likelihood that the suspect would escape in the absence of swift police action. *United States v. Williams*, 612 F.2d 735, 739 (3d Cir. 1979), *cert. denied*, 445 U.S. 934, 100 S.Ct. 1328, 63 L.Ed.2d 770 (1980). Here, the originally contemplated offenses were relatively minor liquor violations with no indication weapons would be present. The record does not support exigent circumstances sufficient to warrant entry of the Lindquist home without a warrant.

[7, 8] RCW 10.31.100 provides in pertinent part:

> A police officer having probable cause to believe that a person has committed or is committing a felony shall have the authority to arrest the person without a warrant. A police officer may arrest a person without a warrant for committing a misdemeanor or gross misdemeanor only when the offense is committed in the presence of the officer.

The State contends arrest warrants were not needed to enter the Lindquist residence since misdemeanors or gross misdemeanors were being committed in the presence of the officers. We disagree. The facts do not support the State's contention. Sergeant Schuchman, at the suppression hearing, indicated he had no more than a suspicion a misdemeanor was being committed. He stated, after initially observing the vehicles and suspects at the residence, "I felt at that point we had probable cause to go into the residence to check to see *if in fact they were drinking.*" (Italics ours.) If minors were not drinking, no crime was being committed. Additionally, it should be noted that no one testified at the suppression hearing who the suspect minors were or who owned the suspect cars. Without articulating specific facts pertaining to a specific person who is committing a misdemeanor, the officer has little more than a hunch or suspicion. Arrest based on suspicion or for purposes of investigation will not be upheld. *State v. Ellison*, 77 Wash.2d 614, 467 P.2d 839 (1970).

We conclude the officers' entry into the Lindquist residence without an arrest or search warrant was unlawful. Since they were not in a place they had a right to be, all evidence seized as a result of their unlawful entry must be suppressed. As noted by the trial judge, the incidence of underage drinking is a source of grave concern for society and police action geared toward curtailing this activity is warranted; but sacrificing Fourth Amendment protections in favor of allowing unconstitutional investigations [illegible] a poor trade off.

Defendants' motion to suppress should have been granted. Reversed.

FARIS, J. Pro Tem., and McINTURFF, J., concur.

39 Wash.App. 130

STATE of Washington, Appellant,

v.

Raymond J. OWENS, Respondent.

No. 6068-III-3.

Court of Appeals of Washington, Division 3, Panel One.

Dec. 11, 1984.

Review Denied Feb. 15, 1985.

The State appealed from order of the Superior Court, Kittitas County, W R. Cole. J., suppressing testimony of police officer and his passenger regarding defendant's flight from illegal traffic stop. The Court of Appeals, McInturff, J., held that police officer and his passenger could testify regarding defendant's flight from illegal traffic stop, and it was for trier of fact to determine whether defendant's actions of accelerating car and racing through town at speeds of fifty miles per hour and through five stop signs were normal and reasonable reactions to illegal stop.

Vacated and remanded.

1. Arrest ⇐68(4)

"Seizure" within meaning of Fourth Amendment occurs when a reasonable person believes he is not free to leave. U.S.C.A. Const.Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

2. Arrest ⇐68(4)

In case of automobiles, "seizure" occurs when police officer switches on his flashing light. U.S.C.A. Const.Amend. 4.

3. Criminal Law ⇐351(3), 737(1)

Police officer and his passenger could testify regarding defendant's flight from illegal traffic stop, and it was for trier of fact to determine whether defendant's actions of accelerating car and racing through town at speeds of fifty miles per hour and through five stop signs were normal and reasonable reactions to illegal stop. West's RCWA 46.61.024; U.S.C.A. Const.Amend. 4.

4. Criminal Law ⇐304(1)

Judicial notice would be taken of fact that the fifty mile per hour race through town with disregard for five stop signs is not normal and reasonable reaction to illegal stop, but shows complete wanton and wilful disregard for life and property of others.

Joseph Panattoni, Prosecuting Atty., Ellensburg, for appellant.

Chelsea C. Korte, Dano, Cone, Fraser & Gilreath, Ellensburg, for respondent.

McINTURFF, Judge.

The State appeals an order suppressing the testimony of a police officer and his passenger regarding Mr. Owens' flight from an illegal traffic stop. We vacate the order and remand for trial.

Officer Patrick Woodruff of the Roslyn police department first observed a black and white Chrysler Imperial with Montana license plates in December 1982, and subsequently on four other occasions in January and February 1983. On March 13, 1983, although the car was not engaged in any other illegal activity, the officer attempted to stop the car, suspecting it was being operated in violation of the vehicle licensing statute, RCW 46.16.010.[1] As he ap-

1. RCW 46.16.010 provides in part:

It shall be unlawful for a person to operate any vehicle over and along a public highway

did not. On the other hand, the Perrydale school superintendent testified:

"'[SUPERINTENDENT:] Any change you make tax dollar wise, in the Perrydale District, it is adversely going to affect the children in that district. We're presently under a tax rate limitation law that says we cannot just raise the tax rate of a district and reapportion out the costs. So what I'm saying is, if the $2,000 or $3,000 in taxes from the Kumley property were removed from the Perrydale District, we would not be able to recoup that money; that would be a loss to our District of that amount.

* * * * * *

"CHAIRMAN: If Perrydale is cut $4,000, say for round figures, then for the sake of argument, what might be cut?

"[SUPERINTENDENT]: Oh, we're looking at half of a teacher's aide perhaps. At this point who knows where you begin, textbooks? We're right down to bare bones now, we've had our tax levy up twice and it's been defeated. Hopefully, we're going to be able to pay it so we can open in the fall. It could be any part of our program."

The Board found that the proposed change would have a substantial adverse affect upon the ability of the Perrydale School District to provide the educational program required by law, that the record contained no evidence that the proposed change meets the criterion in ORS 330.090(2)(a) and that petitioners failed to carry their burden to present such evidence. Petitioners' assignment of error is without merit.[3]

Affirmed.

3. Because of our disposition of petitioners' first assignment of error, it is not necessary to discuss their other assignments.

75 Or.App. 292

STATE of Oregon, Respondent,

v.

Vernon Herman ROBERTS, Appellant.

72256 D.I.; CA A34830.

Court of Appeals of Oregon.

Argued and Submitted July 15, 1985.

Decided Sept. 18, 1985.

Defendant was convicted in the District Court, Washington County, Michael J. McElligott, J., of driving under influence of intoxicants, and he appealed. The Court of Appeals, Young, J., held that warrantless entry into defendant's residence to effect arrest was unreasonable.

Reversed and remanded.

1. Searches and Seizures ⇐3.3(1)

"Exigent circumstances" justifying warrantless entry into residence involve emergency situation requiring swift action to prevent imminent danger to life or serious damage to property or to forestall imminent escape of suspect or destruction of evidence.

See publication Words and Phrases for other judicial constructions and definitions.

2. Automobiles ⇐349

Need to secure evidence of crime of driving under the influence of intoxicants, that is, the defendant's body, might justify warrantless entry into home if state proves that arresting officers could not have obtained warrant before alcohol in defendant's body dissipated.

3. Searches and Seizures ⇐3.3(1)

Police officers cannot create their own exigencies by failing to familiarize themselves with constitutionally mandated procedures

4. Arrest ⇐68.5(4)

Warrantless entry into defendant's residence to effect arrest for driving while under influence of intoxicants was unreasonable where, even though officers had probable cause to believe that defendant had been driving his car while under influence of intoxicants and to believe that defendant was in his apartment, no exigent circumstances excusing failure to obtain warrant were presented by officers' lack of familiarity with procedure for obtaining warrant and resultant delay that obtaining warrant would have entailed. Const. Art. 1, § 9.

Steven L. Price, Hillsboro, argued the cause and filed the brief for appellant.

Ann F. Kelley, Asst. Atty. Gen., Salem, argued the cause for respondent. With her on the brief were Dave Frohnmayer, Atty. Gen., and James E. Mountain, Jr., Sol. Gen., Salem.

Before GILLETTE, P.J., JOSEPH, C.J., and YOUNG, J.

YOUNG, Judge.

Defendant appeals his conviction for driving while under the influence of intoxicants (DUII). ORS 487.540. He argues that the trial court erred in denying his motion to suppress evidence obtained as a result of a warrantless entry into his residence. We agree and reverse.

Sunday, September 30, 1984, at approximately 2:30 p.m. Deputies Bass and Kayfes received a radio dispatch to check for a drunk driver in a brown Pinto, license plate JTW 806. The deputies found the vehicle off the road behind a guard rail. Kayfes searched the unlocked car and through Motor Vehicle Division records determined that defendant was the last known owner of the vehicle and that he lived at a particular address on SW Franklin Street. Bass was told by a service station attendant that a drunken man had recently walked into the station, indicated that his car was off the road and used the telephone to call a taxi. The taxi company reported that a driver had picked up a passenger at the station at 2:33 p.m. and had dropped him off at the Franklin Street address.

The deputies arrived at the Franklin Street address at 2:58 p.m. They knocked on the door and rang the door bell with no response. The police dispatcher called defendant's phone number. The deputies heard the phone ring, and then it stopped ringing. The dispatcher verified that the phone had been picked up and immediately hung up. The deputies consulted with their sergeant, who advised them to enter the home to check on defendant's condition. They entered the unlocked apartment and announced their presence. They went upstairs to the bedroom and found defendant in bed. Kayfes asked defendant if he was all right and if he owned the brown Pinto. Defendant responded yes to both questions. He was then advised of his *Miranda* rights and arrested. He took a breath test which registered a .23 percent blood alcohol content. He admitted that he was drunk.

Defendant filed a pretrial motion to suppress "all evidence including statements of defendant obtained as a result of the police officers' entry into the defendant's residence on the ground that the warrantless entry violated his state and federal guarantees against unreasonable searches and seizures. Or. Const. Art. I, § 9; U.S. Const. Amends. IV, XIV. The motion was denied.

In order to justify a warrantless entry of a residence to effectuate an arrest, the state must demonstrate both probable cause to arrest and exigent circumstances justifying the entry. *Payton v. New York*, 445 U.S. 573, 590, 100 S.Ct. 1371, 1382, 63 L.Ed.2d 639 (1980); *State v. Rubert*, 46 Or.App. 843, 612 P.2d 771 (1980). The officers had probable cause to believe that defendant was driving his car while under the influence of intoxicants and probable cause to believe that defendant was in the apartment. The critical issue is whether the state carried its burden to prove that

there were exigent circumstances excusing the failure to obtain a warrant.

[1] "Exigent circumstances" involve an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property or to forestall the imminent escape of a subject or the destruction of evidence. *State v. Girard*, 276 Or. 511, 514 n. 2, 555 P.2d 445 (1976); *State v. Parras*, 43 Or.App. 373, 376, 602 P.2d 1125 (1979), *rev. den.* 288 Or. 335 (1980). The state argues that the officers' concern for defendant's health and the need to test for blood alcohol content before the alcohol naturally dissipated justified proceeding without a warrant. We agree with the trial court that there was no evidence of a medical emergency.

Defendant cites *Welsh v. Wisconsin*, — U.S. —, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984), for the proposition that, under the Fourth Amendment, a warrantless entry into a residence for the purpose of arresting a drunk driver cannot be justified under any circumstances by the need to secure evidence of blood alcohol content. The facts in *Welsh* are strikingly similar to the facts in this case. The distinction is the seriousness of the crime. The Supreme Court explained:

> "The State of Wisconsin has chosen to classify the first offense for driving while intoxicated as a non-criminal civil forfeiture offense for which no imprisonment is possible. * * * Given this expression of the state's interest, a warrantless home arrest cannot be upheld simply because evidence of the petitioner's blood alcohol level might have dissipated while the police obtained a warrant." — U.S. at —, 104 S.Ct. at 2100, 80 L.Ed.2d at 746 (citations omitted).

Oregon law treats drunk driving as a serious criminal offense. DUII is a Class A misdemeanor. ORS 487.540(3). A first offender may be imprisoned for up to one year. ORS 161.615(1). The United States Supreme Court's holding in *Welsh* is inapposite.

[2] Because of the peculiar nature of the DUII offense, defendant's personal condition and, therefore, his person are evidence. In some circumstances, the need to secure that evidence of the crime of DUII —defendant's body—might justify a warrantless entry of a home, *if the state proves that the arresting officers could not have obtained a warrant before the alcohol in the suspect's body dissipated.* We turn to the evidence on that question.

[3] The evidence offered by the state in this case consisted of the officers' testimony that obtaining a warrant would have taken an entire day, because the officers had no familiarity with the procedure. Police officers cannot create their own exigencies by failing to familiarize themselves with constitutionally mandated procedures. The court found that the state's evidence as to exigency was in "somewhat of a peculiar mode," because the testifying officer did not really know how long it would take to get a warrant. The court then made the following factual findings:

> "I do have some experience in those sorts of situations and so I kind of in effect know from my own experience as opposed to the evidence that it wouldn't take a day but it would take two to three hours and then the location of a judge and the securing of the warrant would take—some of that can go on during the same time but you have to deliver the papers, he has to sign them, etc. So you're talking something in the area of three to four hours, assuming one of the judges was available at that time * * * and you'd be in the area of six or seven hours from the time of arriving to the arrest * * * and I know that an .08 will dissipate from a person's body in something like four hours * * *."

The court's factual findings are not supported by any evidence in the record.[1] We also note that the court did not consider the

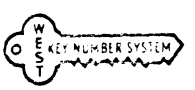
1. There is nothing in the record to suggest that the trial court meant to take judicial notice of the time necessary to obtain a warrant, but that would not have been a proper subject for judicial notice in any event. *See* OEC 201(b).

[redacted] 133.545(4); 133.555(3), a procedure which is available when a personal application would interfere with the ability of the police to conduct a timely search. *State v. Jordan*, 73 Or.App. 84, 88 n. 2, 697 P.2d 1004 (1985).

[redacted] They offered no credible evidence of the [redacted] any evidence concerning the time required to secure the evidence, we will not assume that the officers could not have obtained a warrant within a reasonable time. *See State v. Robert*, *supra*, 48 Or.App. at 847, 612 P.2d 771.

[4] The state failed to carry its burden to prove exigency. We hold that the entry into defendant's [redacted] was unreasonable under Article I, section 9. The [redacted] in failing to prove the evidence obtained by virtue of the entry.[2]

Reversed and remanded for a new trial.



75 Or.App. 262

In the Matter of the Compensation of Charles S. Haynes, Claimant.

Charles S. HAYNES, Petitioner,

v.

WEYERHAEUSER CO., Respondent.

81-09765; CA A33306.

Court of Appeals of Oregon.

Argued and Submitted March 1, 1985.

Decided Sept. 18, 1985.

Reconsideration Denied Nov. 1, 1985.

Review Denied Nov. 26, 1985.

Claimant petitioned for review of decision of Workers' Compensation Board in dispute between claimant and self-insured employer over appropriate amount of payment of doctor's fee for services in connection with an accepted claim. The Court of Appeals, Young, J., held that Board lacked jurisdiction, since under statute, a dispute concerning amount of fee to which medical service provider is entitled for providing medical services to compensibly injured workers is excluded from jurisdiction of Hearings Division and Board.

Affirmed.

Workers' Compensation ⇐1086

Pursuant to ORS 656.704(3), a dispute concerning amount of fee to which medical service provider is entitled for providing medical services to compensibly injured workers is excluded from jurisdiction of Hearings Division. Therefore, the Workers' Compensation Board lacked jurisdiction to review dispute between claimant and self-insured employer over appropriate amount of payment of doctor's fee for services in connection with an accepted claim. ORS 656.283(1).

James L. Edmunson, Eugene, argued the cause for petitioner. With him on brief were Evohl F. Malagon, and Malagon & Associates, Eugene.

J.P. Graff, Portland, argued the cause for respondent. With him on brief were Schwabe, Williamson, Wyatt, Moore & Roberts, Portland.

Before GILLETTE, P.J., and VAN HOOMISSEN and YOUNG, JJ.

YOUNG, Judge.

The issue in this workers' compensation case is whether, in light of the provisions of ORS 656.283(1), the Workers' Compensation Board has jurisdiction to review a dis-

2. The state also argues that the warrantless entry was justified, because defendant had "little subjective expectation of privacy in his home" and that defendant "consented" to the entry by not telling the officers to leave when they entered his bedroom. The arguments are without merit.

> otherwise provided in this act and except that the obligations of good faith, diligence, reasonableness and care prescribed by this act may not be disclaimed by agreement but the parties may be [sic] agreement determine the standards by which the performance of such obligations is to be measured of [sic] such standards are not manifestly unreasonable.

14. *See* Utah R. Civ. P. 12(b); *supra* notes 2-3.
15. *Cf.* Walker Bank & Trust Co. v. First Security Corp., 9 Utah 2d 215, 218, 341 P.2d 944, 946 (1959) (bank's agreement with insured caused latter to assume bank would fulfill its obligations thereunder).
16. 756 F.2d 663 (8th Cir. 1985).
17. *Id.* at 668.
18. Although the court in *W.B. Farms* elsewhere indicated that drawee banks are generally not liable to payees on checks, at least one exception was noted in that case, and given our holding concerning a bank's duty to act in good faith and exercise ordinary care in *all* their dealings, another exception is recognized.
19. *See generally* Livingston Indus., Inc. v. Walker Bank & Trust Co., 565 P.2d 1117, 1118 (Utah 1977); *Walker Bank & Trust Co.*, 9 Utah 2d at 217-18, 341 P.2d at 945-46. *Cf.* Wasatch Bank v. Surety Ins. Co. of Cal., 703 P.2d 298, 300 (Utah 1985) ("Whether a third party is a beneficiary of a contract is determined by the intent of the parties to the contract as evidenced by the contract itself and the surrounding facts and circumstances." (Footnote omitted.)).
20. *See supra* note 4 and accompanying text.
21. *See Phillips Home Furnishings, Inc.*, 231 Pa. Super. at 183-84, 331 A.2d at 844-45.
22. *See id.* at 184, 332 A.2d at 844-45.
23. *Walker Bank & Trust Co.*, 9 Utah 2d at 218, 341 P.2d at 946.
24. *See supra* notes 5-13 and accompanying text; *see also* Utah Code Ann. 70A-1-203 (1980) ("Every contract or duty within this act imposes an obligation of good faith in its performance or enforcement.").

ZIMMERMAN, Justice: (Concurring in the Result)

I agree that this case should be remanded to the trial court because there were adequate allegations in the complaints to warrant further proceedings, under either tort or contract rubric, that could lead to the recovery of the damages spelled out in section 70A-4-103 of the Commercial Code. *See* Utah Code Ann. §70A-4-103 (1981); U.C.C. §4-103 (1978). However, I would make it clear that the question of whether the bank failed to act in good faith is quite a different issue than whether it failed to exercise ordinary care.

Section 70A-4-103 governs the remedies available in this case as a result of either a failure to exercise ordinary care or actions taken in bad faith. Section 70A-4103(5) permits the collection of consequential (but not punitive) damages when "bad faith" is shown, but when nothing more is proven than a "failure to exercise ordinary care," one may recover only "the amount of the item reduced by an amount which could not have been realized by the use of ordinary care."[1] Utah Code Ann. §70A-4-103(5) (1981). The concepts of "good faith" and its opposite, "bad faith," as well as that of "ordinary care," should not be casually smeared together under the rubric of "good faith and ordinary care," as the majority appears to do at places in its opinion. This sort of casual use of terminology invites conceptual misunderstandings by the Bar, trial courts, and juries. In articulating the law, we should do so with some analytical precision. That is one of our primary obligations as an appellate court. *See Johnson v. Rogers*, 763 P.2d 771, 785 (Utah 1988) (Zimmerman, J., concurring in part, joined by Hall, C.J., Howe, A.C.J., and Stewart, J.).

1. Because the damages specified in section 70A-4-103(5) are specially tailored for UCC violations and are more limited than what might be available at common law, the result of this statutory tailoring of damages is to make the contract or tort designation of the cause of action rather academic. *Cf. Beck v. Farmers' Ins. Exch.*, 701 P.2d 795, 801-02 (Utah 1985) (comparing range of damages available in tort and contract).

Cite as
99 Utah Adv. Rep. 14

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE of Utah,
Plaintiff and Appellee,
v.
Steven Ray JAMES,
Defendant and Appellant.

No. 870306
FILED: January 6, 1989

FIRST DISTRICT
Honorable VeNoy Christoffersen

ATTORNEYS:

Robert W. Gutke, Nathan D. Hult, Logan, for Appellant

R. Paul Van Dam, Sandra L. Sjogren, Salt Lake City, for Appellee

HOWE, Associate Chief Justice:

On petition of defendant Steven Ray James, which he filed pursuant to Utah Code Ann. §77-35-26(2)(c) (1982, Supp. 1988), we granted this interlocutory appeal from certain pretrial orders in the instant case in which defendant is charged with first degree murder. He claims two errors: (1) that the trial court abused its discretion in denying his motion for a change of venue; and (2) that his right to a fair trial will be jeopardized by the use of a prior conviction as an aggravating circumstance to be proved in the guilt phase of his trial.

On August 26, 1986, defendant reported that his infant son, Steven Roy James, was missing from a parked car in which he had left him in a store's parking lot in Logan, Utah. Extensive news media coverage began immediately. Some of this news

coverage was in connection with information disseminated by the Logan Police Department. Other coverage was in connection with efforts to find the missing child, spearheaded by a local volunteer committee organized for that purpose. Additional coverage was of direct contacts by reporters with the parents of the infant.

On October 11, 1986, the remains of an infant, later identified as Steven Roy James, were found in Cache County, submerged in an area known as the Benson Marina, by a group of duck hunters. The remains had begun to decompose, and identification was made through forensic evidence concerning the infant's hair, footprints and handprints, and identification of the clothing and blanket in which the body was wrapped as being similar to clothing and a blanket belonging to the baby. The actual cause of death was undetermined but listed as a homicide by the state medical examiner. There was no objective evidence, however, as to the cause of death.

Defendant was charged with first degree murder, a capital offense, pursuant to Utah Code Ann. §76-5-202(1)(h) (1978, Supp. 1988). The charge alleged that he intentionally or knowingly caused the death of Steven Roy James and alleged as an aggravating circumstance that defendant had previously been convicted of a felony involving the use or threat of violence to a person. Discovery disclosed that defendant was convicted in 1973 in the state of California of the crime of false imprisonment, which the prosecution argues is a felony involving the use or threat of violence to a person. He allegedly pleaded guilty to false imprisonment pursuant to a plea negotiation in which a charge of kidnapping was dismissed.

CHANGE OF VENUE

Defendant moved for but was denied a change of venue. He argues that the extensive pretrial publicity and the unique circumstances of widespread community involvement in Cache County, a relatively small and homogeneous geographical area, to find the missing child make it extremely difficult for him to obtain a fair trial. Thus, he contends the denial of his motion was an abuse of discretion. The constitutions of Utah and of the United States both guarantee a defendant the right of trial by an impartial jury. Utah Const. art. I, §12; U.S. Const. amend. VI. This right has been implemented by Utah Code Ann. §77-35-29(e)(i) and (ii) (1982, Supp. 1988), which provides:

> (i) If the prosecution or a defendant in a criminal action believes that a fair and impartial trial cannot be had in the jurisdiction where the action is pending, either may, by motion, supported by an affidavit setting forth the facts, ask to have the trial of the case transferred to another jurisdiction.
>
> (ii) If the court is satisfied that the representations made in the affidavit are true and justify transfer of the case, the court shall enter an order for the removal of the case to the court of another jurisdiction free from the objection and all records pertaining to the case shall be transferred forthwith to the court in the other county. If the court is not satisfied that the representations so made justify transfer of the case, the court shall either enter an order denying the transfer or order a formal hearing in court to resolve the matter and receive further evidence with respect to the alleged prejudice.

See Utah R. Crim. P. 29(e)(i), (ii).

Although the statute speaks in terms of the trial court's being "satisfied" that the representations made in the affidavit are true and justify transfer of the case, this Court has apparently never defined the term "satisfied." We note that this term has been employed in our change of venue statute since at least 1888. *See* 2 Comp. Laws of Utah §4992 (1888). In the long line of cases which have come to this Court beginning with *State v. Carrington*, 15 Utah 480, 50 P. 526 (1897), we have held that it lies within the sound discretion of the trial court to determine if a change of venue should be granted on the ground that a fair and impartial trial cannot be had in the county in which the offense has been committed, and this Court will not disturb that decision unless an abuse of discretion is shown. We have in every case which has come to this Court found no abuse of discretion in the denial of a change of venue by the trial court. Only in *State v. BeBee*, 110 Utah 484, 491, 175 P.2d 478, 481 (1946), did we go so far as to say that "it certainly would not have been error for the court to have granted a change of venue and we are of the opinion that it would have been better if the trial court had granted the change under the circumstances ...." The circumstances of that case which prompted that strong statement from this Court were

> inflammatory newspaper comments; suggestive remarks of a church official quoted in the paper; the gathering of an armed mob; a comparatively small community, no doubt closely knit by church affiliations; a deceased well known to the community, popular, and having many friends and relatives throughout the county; and an obviously eccentric old man as an accused whose penchant for rhetorical showmanship repulses what little tolerance might otherwise have been accorded him.

BeBee, 110 Utah at 491, 175 P.2d at 481-82. In every other case decided by this Court on this subject, we have simply held that the denial of a change of venue was not an abuse of discretion and that the showing made by the defendant in support of his motion was inadequate. But we have never defined or attempted to indicate other than our expression in *State v. BeBee*, quoted above, what would be an adequate showing. Even in that case, however, we did not hold that the denial was an abuse of discretion, although we did state that "it would have been better" if the change of venue had been granted.

Although the term "satisfied" is often used in the law to mean something akin to a conviction or belief beyond a reasonable doubt, in the context of change of venue, the term should not be given that meaning. In *State v. BeBee*, in dictum we indicated that "where there is a probability" that pretrial publicity and prejudice will be given undue consideration or that bias will creep in because of these factors, it would be well for the trial judge to remove the trial to a place far enough away where such influence would be a negligible factor if present at all. Later, in *State v. Wood*, 648 P.2d 71, 88-89 (Utah 1982), we stated that the affidavit of defense counsel and a newspaper article regarding the victim's father fell

far short of demonstrating that there was such a tainted community attitude that a fair and impartial trial was "not likely." In an attempt to more definitely define the standard to be followed by the trial judge in considering a motion for a change of venue, we conclude that the judge should grant the motion whenever he or she finds a reasonable likelihood that a fair trial cannot be had unless the motion is granted. This is the rule fashioned by the Supreme Court of California in *Maine v. Superior Court*, 68 Cal. 2d 375, 438 P.2d 372, 66 Cal. Rptr. 724 (1968), taking its cue from language used in *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966). In a later case, *Frazier v. Superior Court of Santa Cruz County*, 5 Cal. 3d 287, 486 P.2d 694, 95 Cal. Rptr. 798 (1971), the California court explained that a reasonable likelihood of prejudice does not mean that the prejudice must be more probable than not. In summary, although section 77-35-29(e)(ii) employs language to the effect that the trial court should be "satisfied" that a fair and impartial trial cannot be had in the jurisdiction where the action is pending, the burden on the defendant should be understood to be that he must raise a "reasonable likelihood" that such a trial cannot be afforded him.

We now examine the record in an attempt to isolate the factors which have been considered criteria of the potential for prejudice from pretrial publicity. Factors to be considered include (1) the standing of the victim and the accused in the community; (2) the size of the community; (3) the nature and gravity of the offense; and (4) the nature and extent of publicity. *Martinez v. Superior Court of Placer County*, 29 Cal. 3d 574, 629 P.2d 502, 174 Cal. Rptr. 701 (1981). We will discuss the impact of these factors in the instant case, bearing in mind that we take the totality of the circumstances into account. *State v. Pierre*, 572 P.2d 1338, 1350 (Utah 1977), *cert. denied*, 439 U.S. 882 (1978).

Standing of Accused and Victim in Community

Defendant and the victim's mother had lived together in Logan for only two weeks prior to the infant's disappearance. They were not married. Defendant has relatively long hair and at an earlier time wore a stud in one ear. At his preliminary hearing, there was testimony that he had been using drugs shortly before the child disappeared. All of this tends to depict him as being different from most residents in Cache County. The victim was three months old at the time of his disappearance.

Size of the Community

Logan, where the child lived at the time of his disappearance, is the county seat of Cache County and in 1986 had an estimated population of 28,880. Cache County has an estimated population of 69,200.

"[T]he smaller the community, the more likely there will be a need for a change of venue in any event when a heinous crime is committed." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 599-600 n.22 (1976) (Brennan, J., concurring in the judgment). A populous metropolitan community will decrease the need for a change of venue. *People v. Harris*, 28 Cal. 3d 935, 623 P.2d 240, 171 Cal. Rptr. 679, *cert. denied*, 454 U.S. 882 (1981); *People v. Manson*, 61 Cal. App. 3d 102, 190, 132 Cal. Rptr. 265, 318 (1976), *cert. denied*, 430 U.S. 986 (1977) (refusal to move trial from Los Angeles area). In a small town, a major crime is likely to be embedded in the public consciousness with greater effect and for a longer time than it would be in a large, metropolitan area. *Martinez v. Superior Court of Placer County.*

In the instant case, not only are we concerned with a small city and a small county, but during the month and one-half that the child was missing, there was a widespread community effort to help locate the missing child. The community's efforts were organized and directed by the wife of the bishop of a local ward of the city's predominant church. The ward's church building was used as the center for the volunteer activity. In addition to eighty-six adult volunteers, offers of assistance came from three Girl Scout groups, a high school journalism class, the local relief societies of the predominant church, an Assembly of God church, and various local businesses. An appeal was made to school children of the community for envelopes and stamps for the purpose of sending out flyers. Thousands of flyers, posters, and envelopes were printed. The paper and the printing labor were donated. Sixteen thousand flyers were mailed out by Medmaster. Preparations were made for a nationwide effort to find the baby. Phones were donated, and pictures were printed by a grocery chain on grocery bags and distributed to 600 stores. A fast food restaurant printed thousands of tray place mats with the infant's picture. Besides the large contributions in material, labor, and postage, cash contributions exceeded $1,700. Much of that money was collected through small donations dropped into bottles which had been placed in grocery stores. One business in Logan loaned typewriters to the volunteers. Another business sent flyers out to all their employees. Photographic materials and labor were donated in preparing photos of the missing child. Other businesses donated office supplies to assist the volunteers. A public utility supplying natural gas in an area spreading over three states, including Cache County, printed 500,000 copies of the story of the child's disappearance and mailed them with its monthly statements. Several fast food businesses provided lunches for the volunteers.

The chairwoman of the volunteer committee testified that most of the volunteers "had some degree of emotional involvement in what they were doing" and, after the child's body was found and defendant had been charged with the killing, that she heard a news report that some of the volunteers "felt they had been a bit gullible." She denied that any volunteer had made that comment to her, but admitted that many people had expressed opinions to her concerning defendant's guilt or innocence. She testified, however, that she personally was content to presume him innocent until he had been proved guilty.

Nature and Gravity of the Offense

The body of the three-month-old infant was found submerged in a river and weighted down with rocks. Defendant is charged with the intentional killing of his child, first degree murder, a capital offense which could be punishable by death.

Nature and Extent of Publicity

The disappearance of the child, the search effort, and the discovery of the child's body a month and one-half later generated extensive media coverage. Some of it was in connection with information disseminated by the Logan Police Department. Other coverage was in connection with efforts to find the missing child, spearheaded by the volunteer committee. Additional news stories came from direct contact by reporters with the parents of the infant. The three television stations in Salt Lake City which can

be viewed in Cache County covered the events as follows: Television station KUTV, channel 2, carried eighty-four news items on thirty-four different days; KTVX, channel 4, carried thirty-six news items on twenty-five different days; KSL, channel 5, carried thirty-eight news items on twenty-five different days.

Newspaper coverage included forty-five news articles on forty-two different days in *The Herald Journal*, Logan's daily newspaper. *The Cache Citizen*, a Cache Valley weekly newspaper, published five feature articles. Moreover, two local radio stations carried numerous accounts of the events.

Not only was the media coverage extensive, some of it also carried implications and innuendos of defendant's complicity in the child's disappearance. References were made to defendant's becoming "uncooperative," that he "was always the key suspect," and that he "persistently denied involvement." Contrast was drawn between his tears and the "real ones" belonging to one of the volunteers. The statement was made that he "acted every inch the grieving father." It was further reported that "he even threatened to kill the detective who cracked the case." Moreover, some of the information disseminated by the police was equally troublesome, viz., that defendant had become uncooperative, that police wanted answers, that details related him to a California abduction at knifepoint and a police investigation of a California child abuse case where an infant sustained severe injuries, that the child's mother had passed a polygraph but that defendant twice refused to take one, that defendant was hostile to police, and that he was always the key suspect.

Analysis and Conclusion

The evidence on the foregoing four factors weighs in favor of granting a change of venue. Defendant, being a newcomer to Logan and having a lifestyle quite different from most of its residents, suffers from a lack of standing in the community. The victim was a helpless, innocent baby. Logan and Cache County are small, which weighs against defendant. Defendant stands charged with first degree murder, the only criminal offense in Utah which may be punishable by death. Because of the lapse of a month and one-half between the time the child disappeared and the time his body was found submerged in a river, extensive news coverage was made of the disappearance, the search efforts, and the discovery of the body. Defendant was always a suspect because of his past record, and this fact was mentioned with others which cast suspicion upon him from the very start.

While all of these facts weigh in favor of changing venue, we believe that there is in this case another factor which clinches our belief that a reasonable likelihood exists that defendant cannot receive a fair and impartial trial in Cache County. Unlike any case which has come before this Court where it has been contended that a change of venue should have been granted, in the instant case there was a widespread community effort to locate the missing child. This effort touched many adults, schoolchildren, and businesses. They responded with money, material, and countless hours of labor. This community involvement brought many people much closer to this alleged crime than ordinarily occurs. One television news story reported that the events had "touched the community at its very core"; another news release quoted a Logan resident as saying, "We're all taking this very personally. It's as though someone has violated our homes ... our families." In *State v. Wood*, 648 P.2d 71 (Utah 1981), *State v. Pierre*, 572 P.2d 1338 (Utah 1977), *cert. denied*, 439 U.S. 882 (1978), *State v. Lafferty*, 749 P.2d 1239 (Utah 1988), and *State v. Bishop*, 753 P.2d 439 (Utah 1988), all recent capital murder cases in which we held that the trial court had not abused its discretion in denying motions for change of venue even though the crime in each case was heinous and aroused many of the populace, there was no community involvement. We believe this involvement gives the instant case a very different dimension and accentuates the difficulty in seating a jury which has not been touched in some way, either directly or through family or friends, with this crime, which played a prominent part in the lives of Cache County residents for a month and one-half.

The trial judge, in denying the motion for a change of venue, commented that "the easiest thing" for him to do would be to grant the motion, but that even though information prejudicial to defendant had been disseminated through the media, he did not find that its impact had been so great that he could not find twelve jurors in Cache County who could try the case without bias or prejudice against defendant. He cited the testimony of the chairwoman of the volunteers, who stated that although she had been heavily involved in the search for the child, she had no opinion as to defendant's guilt or innocence and would presume him to be innocent until proved guilty. We do not doubt the sincerity of the conclusion of the trial judge, nor do we question the integrity of the chairwoman's testimony. Jurors are commonly seated to hear felony trials after they have stated that despite hearing prejudicial information about the defendant and perhaps even having formulated some opinion as to guilt, they would be able to set aside any preconceived notions and decide the case on the evidence presented at trial. This Court has upheld on appeal attacks against many jury verdicts rendered under such circumstances. *See State v. Lafferty* and cases cited therein. We believe, however, that the instant case presents a set of circumstances not usually found in criminal cases. Here, the impact of the alleged crime reached deeply into the community. Not only were residents exposed to media information on almost a daily basis, but also many adults and children assisted in one way or another in the month and one-half search effort. Although we do not doubt that twelve persons could be found who could honestly promise to set aside any prejudicial information which they had heard and any preconceived notions which they had formed, there are limits to what should reasonably be asked and expected of prospective jurors who have been exposed to the events surrounding the alleged crime. See *State v. Jones*, 734 P.2d 473 (Utah 1987), where we reversed the trial court's denial of a challenge for cause made by the defendant against two jurors who were closely associated with members of the victim's family, but who, when pressed, stated that they would base their decision on the evidence and follow the law as instructed upon.

Defendant's right to a fair and impartial trial need not be exposed to the risks which would attend the calling of the jury from Cache County. This is a capital case. Not only will a jury be required to determine the guilt or innocence of defendant, but if guilt is found, the jury will probably be urged by the prosecution to impose the death penalty. In deciding whether to impose the death penalty, the jury must weigh aggravating circumstances against mitigating

circumstances. This is the most momentous judgment a jury can be asked to make. The judgment should be made in an atmosphere as free from any taint of bias or prejudice as is reasonably possible. Because of the unique circumstances of this case, it would not be fair or wise to either defendant or the residents of Cache County to require a Cache County jury to make that decision.

Unlike any of the other cases coming before this Court where the trial court has denied a motion for a change of venue, this case has not yet been tried. This circumstance affords us the opportunity to review the denial before any error committed would be prejudicial to defendant. We are in accord with a statement made by the Supreme Court of the United States in *Sheppard v. Maxwell*, 384 U.S. 333, 363, 86 S. Ct. 1507, 1522, 16 L. Ed. 2d 600 (1966), that "reversals are but palliatives" and that "the cure lies in those remedial measures that will prevent the prejudice at its inception." Later, the California court in *Martinez v. Superior Court of Placer County* expressed the same sentiment:

> Neither an accused whose life hangs in the balance nor the authorities charged with enforcing and administering the law should be required to face the possibility of a second trial when, as here, we face acute dangers to an impartial trial and when we can avoid them by the simple expedience of a change of venue.

Martinez, 629 P.2d at 508, 174 Cal. Rptr. at 707.

In summary, the trial court abused its discretion in denying the motion for a change of venue. Judicial economy will be served by now reversing the order denying the motion and granting the motion. The trial can then go forward in another county where a jury can be selected free from any taint of prejudice, and if a jury should convict defendant, its verdict would not be vulnerable to attack for community bias and hostility. This Court will then be spared the difficulty it encountered in *State v. BeBee*, where we were of the opinion that "it would have been better if the trial court had granted the change under the circumstances of this case" but struggled to affirm the conviction in spite of that opinion.

ADMISSION OF DEFENDANT'S PRIOR CRIMINAL RECORD

Defendant is charged with murder in the first degree, in violation of Utah Code Ann. §76-5-202(1)(h) (1978, Supp. 1988). That section provides:

> (1) Criminal homicide constitutes murder in the first degree if the actor intentionally or knowingly causes the death of another under any of the following circumstances:
>
> ....
>
> (h) The actor was previously convicted of first or second degree murder *or of a felony involving the use or threat of violence to a person.*

(Emphasis added.) It is alleged that he intentionally or knowingly caused the death of his son and that he had been previously convicted of a felony involving the use or threat of violence to a person. Defendant complains that reading to a jury that he allegedly had been earlier convicted of a felony as part of the charging information before presentation of any evidence will be prejudicial because of the tendency of the jury to convict because he is a "bad person" rather than because he has been proved guilty of capital homicide.

In other contexts, the legislature has recognized the prejudicial impact of presenting prior convictions of a defendant before a jury and has taken necessary precautions to insure that such prejudice based upon a defendant's "status" as a previously convicted felon will not taint a jury's fact-finding task. Our habitual criminal statute, Utah Code Ann. §76-8-1002(2)(3) (1978) provides:

> (2) If the defendant is bound over to the district court for trial, the county attorney shall in the information or complaint set forth the felony committed within the state of Utah and the two or more previous felony convictions relied upon for the charge of being-a habitual criminal. If a jury is impaneled, it shall not be told of the previous felony convictions or charge of being a habitual criminal. The trial on the felony committed within the state of Utah shall proceed as in other cases.
>
> (3) If the court or jury finds the defendant guilty of the felony charged, then the defendant shall be tried immediately by the same judge and jury, if a jury was impaneled, on the charge of being a habitual criminal, unless the defendant has entered or enters a plea of guilty to the charge of being a habitual criminal.

Thus, the court is prohibited from reading a habitual criminal charge to a jury before guilt on the substantive offense is determined. Only if a verdict of guilty is returned can the jury, in a bifurcated proceeding, be presented evidence of past convictions. See *State v. Saunders*, 699 P.2d 738 (Utah 1985), where we held it was an abuse of discretion for a trial court to deny a timely filed motion by a criminal defendant to separately try him on burglary and theft charges from a charge that he unlawfully possessed a firearm while he was a prison inmate housed in a halfway house. Utah Code Ann. §76-10-503(2) (1978, Supp. 1988). The basis of our decision was to avoid any tendency on the part of the fact finder to convict him of burglary and theft because of the prior crime for which he was incarcerated. We affirm that evidence of prior crimes is generally presumed prejudicial and that "absent a reason for the admission of the evidence other than to show criminal disposition, the evidence is excluded." *Saunders*, 699 P.2d at 741.

In order to avoid prejudice to the defendant in the instant case while the jury is deciding his guilt of the offense charged, we exercise our inherent supervisory power over trial courts and adopt the bifurcated approach advanced in *State v. Bishop*, 753 P.2d 439, 498 (Utah 1988) (Zimmerman, J., concurring in the result), and apply it to section 76-5-202(1)(h). The jury is not initially to be presented with mention or evidence of defendant's prior conviction. If the jury finds him guilty of an intentional and knowing killing, it may then be instructed on the prior conviction if the trial court determines that it qualifies under section 76-5-202(1)(h). The jury should then return to deliberate the existence or nonexistence of the prior conviction, which will, in turn, determine whether the homicide is first or second degree murder. "It is especially appropriate that we exercise that supervisory power to require certain procedures when fundamental values are threatened by other

modes of proceeding." *Bishop*, 753 P.2d at 499. Justice Zimmerman wrote:

> The legitimate interests of the state and the accused can easily be accommodated through a bifurcated procedure. When the underlying crime is charged, and enhancing circumstances involving other crimes or bad acts factually related to the underlying criminal episode are also charged for the purpose of increasing the severity of the punishment for the underlying crime, the trial court must divide the trial into separate segments. First, evidence regarding the underlying crime should be admitted, and the jury should be asked to determine guilt or innocence based on that evidence alone. Second, if a guilty verdict is returned on the underlying charge, then evidence regarding the enhancing circumstances should be heard by the same jury for the purpose of determining whether those circumstances have been proven beyond a reasonable doubt.

Bishop, 753 P.2d at 498.

We reverse the order denying defendant's motion for a change of venue and grant the same. The trial court is directed to remove the case to another county "free from the objection" in accordance with section 77-35-29(e)(ii). There, the trial of defendant shall proceed in accordance with this opinion.

WE CONCUR:
Gordon R. Hall, Chief Justice
I. Daniel Stewart, Justice
Christine M. Durham, Justice
Michael D. Zimmerman, Justice

Cite as
99 Utah Adv. Rep. 19

IN THE SUPREME COURT OF THE STATE OF UTAH

Kit C. LARSON,
Plaintiff and Appellant,
v.
SYSCO CORPORATION, Robert Jenson, and Robert Wagner,
Defendants and Appellees.

No. 20682
FILED: January 10, 1989

SECOND DISTRICT
Honorable David E. Roth

ATTORNEYS:

David R. Hamilton, Michael G. Belnap, Ogden, for Appellant

Rick J. Sutherland, Salt Lake City, for Appellees

HOWE, Associate Chief Justice:

Plaintiff Kit C. Larson appeals from a summary judgment granted in favor of his former employer, SYSCO Corporation, and his supervisors, defendants Robert Jenson and Robert Wagner, in a suit arising out of Larson's termination of employment.

Larson was employed by SYSCO as a commissioned salesman from March 1981 through April 1984. He worked under a written employment agreement which provided that his employment could be terminated by SYSCO at any time upon notice. Larson was terminated by his immediate supervisor, Wagner, without explanation except for the statement that he was to be "let go." SYSCO paid Larson all commissions due him plus severance pay for a two-week period, representing approximately 30 percent per week more than that which he had earned as commissions immediately prior to his termination. SYSCO submitted to the Utah Department of Employment Security the required "blue slip," which indicated that Larson's employment had been terminated for "poor performance."

Larson subsequently filed this suit, alleging breach of contract, defamation, and the intentional infliction of emotional distress arising from the termination. After discovery was conducted, SYSCO moved for summary judgment on all of Larson's claims. The motion was granted. Larson brings this appeal, assailing the grant of summary judgment and the denial of his motion to amend his complaint.

I.

Larson contends that there are numerous issues of disputed fact which should have precluded the grant of summary judgment. First, he argues that the manner of his termination did not comply with the provision of the written employment contract governing notice to be afforded him upon termination. In this respect, the agreement provides:

> Employee's employment with the Company may be terminated at any time by the Company or by Employee upon proper written notice. Proper notice is related to the length of employment as follows: ... over one (1) year employment, two weeks' notice.

Larson worked for SYSCO for more than three years and under the contract was entitled to two weeks' written notice. It is undisputed that after the employment contract had been executed, SYSCO revised its policy concerning employee termination, and instead of giving the employee the advance notice required by the contract, it terminated the employee without notice but provided him with severance pay for a period of time equal to the advance-notice time specified in the contract. This was done in response to SYSCO's experience that sales performance typically declined after receiving written notice of termination. We find no violation of the contract by this policy. Larson was entitled to two weeks' advance notice. He received pay for two weeks but was relieved of the obligation to render any services during that time. This left him free to seek other employment while enjoying full pay without any employment responsibility.

Larson contends that the legality of his termination should be determined according to Idaho law inasmuch as the written agreement provided that "[i]n the event of any dispute arising under this agreement,

: STATE OF UTAH,
Plaintiff.

eid Ellis
Defendant.

SEARCH WARRANT

Case No.

THE STATE OF UTAH TO ANY PEACE OFFICER IN THE COUNTY OF RICH, STATE OF UTAH:

Proof by affidavit was made before me this day by

at there is probable cause for issuance of a search warrant.

YOU ARE THEREFORE COMMANDED to make immediate search, (in the daytime)(~~anytime, day or ght~~), of the person of

the vehicles described as 1978 Pont. 4dr. utah plate 267AKT, dark blue in bjor

the premises described as 727 CISCO rd. a barn red A frame cabin with log cabin attachment on the east side. A sign on the cabin says Hardin ven.

r the following property: A 12 pack of Milwaukee's Best Beer, Milwaukees Bes ver cans full, or Empty.

If you find any of the property described above, or any part thereof, bring it before : immediately at his court and make return within 10 days, as required by Utah Code Ann. :ction 77-23-1 et seq.

You (~~are~~)(are not) authorized to execute this search warrant without giving prior otice of you authority and purpose.

ate signed 10-14-88 Time signed 15:44

Raymond B Cox
Magistrate

#0

THE STATE OF UTAH,

Plaintiff.

vs.

Reid Ellis

Defendant.

PROPERTY RECEIPT, INVENTORY, AND RETURN

Case No.

RECEIPT I, the officer undersigned, acknowledge receiving the property described below, on the date, and time shown, from:

Person _____

Place 727 Cisco Road

Date 10-14-88 Time 17:16

Officer serving Search Warrant

INVENTORY Property seized: 8 packages of firecrackers various sizes 1 snow and red plum Rocket 9 packages of Battle rockets 2 boxes artillery shells 1 open 1 unopened

Justice COURT, STATE OF UTAH
RICH COUNTY

THE STATE OF UTAH,
Plaintiff,
vs.
Reid Ellis
Defendant.

AFFIDAVIT FOR SEARCH WARRANT

Case No.

AFFIDAVIT

RICH COUNTY)
)
STATE OF UTAH) ss

Affiant, being first duly sworn, states on oath that:

1. OFFICER. I am a peace officer in the State of Utah employed for 7 3/4 years by Rich County

2. PROPERTY. The property or evidence for which a search warrant is sought is described as follows: A 12 Pack of Beer Milwaukee's Best Brand Milwaukee's Beer cans Full, or Empty

3. LOCATION. I have probable cause to believe this property or evidence is located on the __person X vehicle X premise (check those that apply) described as: (the description must be so specific that the location could be found by one not knowing where it is). 727 cisco Road Described as a barn red A frame cabin with a log cabin attachment on the east side. A [redacted] sign on the cabin says Harding H

Also a dark blue automobile bearing utah license plate 267AKT

4. STATUTORY GROUNDS. I have probable cause to believe this property or evidence (check those that apply and fill in blank with name of crime)

__X__ was unlawfully acquired or is unlawfully possessed

_____ Has been used or is possessed for the purpose of being used to commit or conceal the commission of the offense of _____.

5. ATTACHMENTS. The following attachments are incorporated in this affidavit as though set forth herein: (list written informants' statements, documentary evidence and other exhibits)

Exhibit 1

Exhibit 2

Exhibit 3

Exhibit 4

Exhibit 5

6. NIGHT SEARCH. I have reasonable cause to believe a search is necessary in the night as follows: (state why property may be concealed, damaged, altered or other good reason).

7. NO KNOCK. I have the following evidence which allows the search to be conducted without notice of authority and purpose: (state why the object of the search may be quickly destroyed, disposed of or secreted or why physical harm may result to a person if notice is given)

8. ANONYMOUS INFORMANTS. The following are designations of anonymous informants:

Their identity is withheld because (state why the informant would be endangered or his usefulness destroyed if name was stated)

RELIABILITY. I believe the informants named herein to be reliable for these reasons: (check those that apply)

_____the following informants made statements against their penal interest:

_____the following informants are citizen informers who have no interest in this matter: (also state which ones are known to you personally)

_____the following informants are peace officers with the departments noted:

__X__the following informants are reliable because (state the name of each informant and facts corroborating his statement or previous reliable statements)

Renea Earley is the owner of the old Rock store, she ~~[illegible]~~ Described the aforementioned vehicle and also the brand of beer that was found in the residence. She also described the defendant.

10. PROBABLE CAUSE. The following facts establish that probable cause exists for the issuance of a search warrant: (state the specific facts of the case, state how they were observed, state the date they were observed and the date they were reported to affiant)

On 10-14-88 at approx 11:45 your affiant recieved a telephone call from Penea Earley who is the owner of the old Rock Store in Laketown, Rich unty, Utah. She told your affiant that 4 male's who appeared to be veniles had just left her store and that one had been concealing square object under his coat. She described the individual as the with short hair. She stated that after they left she walked back where the individual with the short hair had come from and found a 12 pack of Milwaukee beer was missing. Earley told your ant that they were driving a dark blue car with bumper stickers er it and utah plate 267 AKT. She also stated that they told they were staying at a cabin on Bear Lake.

prox 12:40 on 10-14-88 your affiant went to 727 and found the entioned vehicle parked there. Your affiant went to the front door nocked, the individual inside said that the door wouldn't open and would come around, your affiant met the defendant on the East side cabin and identified myself as a police officer. your affiant asked f he was incharge, he said yes, your affiant asked him if it was his , he said yes. your affiant asked him if we could talk about some that was stolen, the defendant stated that he didn't have any beer owed your affiant around the kitchen, and also opened the fridge. We ent into the A frame portion of the cabin where several other males sitting around, as your affiant went into the room, a Milwaukee's beer can was sitting in plain view on the floor near the door. when your t tried to arrest the defendant a fight insued and your affaint had ve the premises and wait for other officers to assist.

DATE SIGNED: TIME SIGNED:

_____
Affiant

Subscribed and sworn to before me this ____ day of _____, 19____.

_____
Magistrate

STATE OF UTAH

COUNTY OF RICH

CITY OF _____

DEFENDANT IS HEREBY
'EN NOTICE TO APPEAR BEFORE

HONORABLE: Kay Cox

ATED AT Lawster

)R BEFORE THE 21 DAY OF Sept 19 88

HE HOUR OF _____ A.M./P.M.

HE Rich JP COURT.

NAME (Last)	(First)	(Middle)	DOB	M / F
Ellis	Reed	H	7-31-70	M

ADDRESS	(City)	(State)	ZIP
PO Box 1160	Randolph	Ut	84064

Driver License No.	State	Vehicle License No.	State	Expires
	UT			

Vehicle Color	Vehicle Year	Vehicle Make	Type	Accident	Direction
				R/A	N S E W

THE ABOVE NAMED DEFENDANT IS CHARGED WITH VIOLATING: 41-6-44.12 32A 12 811

☒ UTAH CODE ☐ COUNTY CODE ☐ CITY CODE NO: _____

ON THE 14 DAY OF Sept 19 88 MILITARY TIME 1243 30

LOCATION Lake Town MILE POST NO. _____

VIOLATION(S): Ticket Class B Misd. for possession of alcoholic beverages by person under legal drinking age

FOR COURT USE ONLY

OF CONVICTION/FORFEITURE _____

_____ SUSPENDED _____

_____ SUSPENDED _____

LEA/FINDING

ility

t Guilty

feited Bail

SEVERITY

☐ Minimum

☐ Intermediate

☐ Maximum

Speeding _____ MPH in a _____ Zone	MPH OVER	INTERSTATE ☐ YES ☐ NO	STOP SIGN F S

WITHOUT ADMITTING GUILT I PROMISE TO APPEAR AS DIRECTED HEREIN ON OR BEFORE: 21 Sept 19 88

SIGNATURE Reed Ellis

I CERTIFY THAT COPY OF THIS SUMMONS AND INFORMATION WAS DULY SERVED UPON THE DEFENDANT ACCORDING TO LAW ON THE ABOVE DATE AND I KNOW OR BELIEVE AND SO ALLEGE THAT THE ABOVE NAMED DEFENDANT DID COMMIT THE OFFENSE HEREIN SET FORTH CONTRARY TO LAW.

DEPUTY _____ NUMBER 163

COMPLAINANT DAN COKAYNE

SUBSCRIBED AND SWORN TO BEFORE ME THIS

DATE _____ A.D. 19 _____ JUDGE _____

WHITE - Court 1 WHITE - Court 2	CANARY - Defendant	PINK - Auditor BLUE - Deputy	DATE SENT TO DLD	DOCKET NO.